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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

No. [redacted]739

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admr. of the Estate of Burse Phillips, Deceased,
Petitioners,

versus

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION BELOW.

At the writing of this petition the opinion of the Court of Appeals has not yet been inserted in the Reports. Such opinion is appended hereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked on the following grounds:

(1) The decision of the Court of Appeals for the Sixth Circuit was dated December 18, 1963, and was filed on that date.

(2) There have been no petitions for rehearing and no requests for extension of time within which to petition for certiorari after the decision of the Court of Appeals.

(3) The statutory provision believed to confer on this Court jurisdiction to review the decision of the Court of Appeals in this case is 28 U. S. C. A., Sec. 1254 (1).

THE QUESTIONS PRESENTED FOR REVIEW.

(1) Was there substantial evidence to support the jury verdict that the Trustees participated in the conspiracy alleged by Petitioners.

(2) After the jury has found that United Mine Workers of America engaged in a conspiracy with major coal producers, a part of which conspiracy involved the imposition of onerous contractual obligations upon small and thin-seamed mines, such as that of Petitioners, to drive such companies out of the industry, such jury verdict being sustained by the District Court and the Court of Appeals, are such onerous contractual obligations enforceable?

(3) Where a Union gains a majority representative status in a collective bargaining unit of employees by means of mobs and violence compelling the employees to join the Union, is the collective bargaining agreement signed by that Union and the employer valid and enforceable in a suit under 29 U. S. C. A., Sec. 185?

(4) Where the employees of Petitioners joined the United Mine Workers of America in an atmosphere of coercion by mob violence and pursuant to arrangements made between Petitioners and the Union and where the Union had not performed the statutory requirements necessary to be performed before a valid Union Security Clause could be inserted in the labor contract already existing be-

tween Petitioners and the Union, is the contract enforceable even though it is an integrated contract and contains a Union Security Clause?

STATUTES AND CONTRACT PROVISIONS INVOLVED IN THE CASE.

There are included in the Appendix hereto the texts of statutes involved and also the pertinent provisions of the National Bituminous Coal Wage Agreement.

STATEMENT OF THE CASE.

The Trustees of the United Mine Workers of America Welfare and Retirement Fund brought the original claim in this case against the partners of Phillips Brothers Coal Company, a small coal-producing business located in East Tennessee, claiming approximately $56,000.00 was due the Trustees as the aggregate of unpaid per ton royalties, based on coal produced, due the Welfare Fund under the National Bituminous Coal Wage Agreement. The suit was filed in the United States District Court for the Eastern District of Tennessee at Knoxville. Jurisdiction was founded either on diversity of citizenship or on 29 U. S. C. A., Sec. 185 (authorizing suits in federal courts for breach of collective bargaining agreement), the basis of jurisdiction not being expressly stated in the complaint. We believe that Counsel for Respondent would agree that this was necessarily a suit under 29 U. S. C. A., Sec. 185. **Textile Workers Union v. Lincoln Mills**, 353 U. S. 448; **Charles Dowd Box Co. v. Courtney**, 368 U. S. 502; **Smith v. Evening News Assoc.**, 371 U. S. 195.

In addition to a number of other defenses, which principally asserted invalidity of the contract under the labor law, the partners defended on the ground that the coal wage agreement which they signed was imposed upon them

pursuant to a conspiracy in restraint of trade and to attain a monopoly, which conspiracy was engaged in by United Mine Workers, the Trustees of the Welfare Fund and certain large coal-producing companies. There was a counterclaim filed against the Trustees and a cross-claim was permitted by the Trial Court to be filed and served against United Mine Workers of America. Both the counterclaim and cross-claim were based on the said conspiracy and were brought under the Sherman and Clayton Acts.

The counterclaim for affirmative relief against the Trustees was voluntarily dismissed before the trial. The issues of the defense to the Trustees' claim based on the conspiracy, and of the cross-claim against United Mine Workers, likewise based on the conspiracy, were submitted to a jury. There was a four and one-half week trial. After deliberating two and one-half days, the jury found the United Mine Workers and the Trustees had engaged in the alleged conspiracy and assessed damages against United Mine Workers in the amount of $90,000. No issue was framed for the jury as to the validity of the contract sued on by the Trustees. Rather the Court charged the jury that the Court would decide that question after the jury verdict on the issues presented to the jury (1553a).[1]

On lengthy motions which were discussed in 366 pages of briefs and in oral arguments (90a) the Trial Court sustained the jury verdict against United Mine Workers and entered judgment for treble the amount of the verdict, plus $55,000 attorneys' fees for a total judgment of $325,000.

The Trial Court set aside that portion of the jury verdict which found that the Trustees had engaged in the

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[1] The reference (1553a) refers to page 1553 in the joint Appendix volumes in the printed certified record of the Court of Appeals filed herewith in the Supreme Court. The letter "a" in later references will refer to the same record.

conspiracy on the ground that the proof did not go beyond a suspicion that a majority of the Trustees had so engaged (97a-98a). The Trial Court held that a portion of the claim of the Trustees must be denied because the proof was uncontradicted that the employees of the company were not members of the Union until a certain date and the contract was invalid until that date. **Garment Workers v. NLRB**, 366 U. S. 731 (99a). The uncontradicted proof on this phase of the case was that the reason the employees did join the Union at this later date was because of the prevalence of mob violence, discussions between the employers and the Union officials with respect to getting the men to join the Union, and the knowledge on the part of the employees that they could not safely return to work until they joined the Union. Accordingly, the employees came to a meeting arranged by the company and the Union and they all signed up at that time. The Trial Court held the contract became valid as of that date (99a) and entered judgment against the partners for Welfare payments due under the contract after that date which aggregated $43,462.82.

The United Mine Workers appealed the judgment entered against it. The appeal involved here was by the partners from the judgment of $43,462.82, in favor of the Trustees. The Trustees did not appeal from the decision of the Court which eliminated the earlier part of the Trustees' claim.

The Court of Appeals for the Sixth Circuit sustained the verdict and judgment in favor of the partners against United Mine Workers of America and, upon the appeal of the partners involved here, sustained the action of the Trial Court in setting aside the jury verdict and entering judgment against the partners in favor of the Trustees.

THE PARTIES.

The original plaintiffs, Trustees of the United Mine Workers of America Welfare and Retirement Fund, will be referred to herein as "Trustees". These Trustees were originally John L. Lewis and Josephine Roche. Henry G. Schmidt was later added when he was named as a Trustee to replace a Trustee who had died before suit was filed.

The original defendants and cross-plaintiffs were the partners Raymond E. Phillips, Burse Phillips and James M. Pennington. Burse Phillips died before trial and his widow and administratrix, Lillian Goad Phillips, was substituted. These parties will generally be referred to herein by the style of their company, "Phillips Brothers Coal Company" or simply "Phillips". United Mine Workers of America will generally be referred to herein as "UMW".

PLEADINGS, PRE-TRIAL ORDER, JURY ISSUES AND DISPOSITION BELOW.

Over two years of research was involved in the preparation of this case. The pleadings and pre-trial orders show an evolution resulting therefrom (11a-56a). Generally, the basic legal defenses of labor law violations and assertions of conspiracy were in the first pleadings (14a-21a), but the scope and details of the conspiracy and the involvement in the conspiracy of labor law violations as a means of accomplishing the conspiracy were not fully spelled out until later amended pleadings and pre-trial orders.

The complaint alleges that on or about October 1, 1953, Phillips and the Union entered into the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, hereinafter referred to as the Wage

Agreement, and at specified dates thereafter entered into said Wage Agreement, as amended September 1, 1955, and as amended October 1, 1956, and that pursuant to the terms of said Wage Agreement, as amended, Phillips was required to pay into the Welfare Fund the sum of 40 cents per ton on each ton of coal produced for use or sale. The parties have stipulated the amount of tonnage of coal so produced during the period of October 1, 1953, through December 31, 1958, which was subject to the 40 cents per ton royalty, that Phillips made royalty payments thereon pursuant to the Wage Agreements in the total amount of $2,227.70, and that the amount of royalty which was not paid on said total production was $55,982.62, being the amount sued for.

Phillips' answer (11a) and amendments thereto (21a, 26a, 30a) admit executing the three Agreements (12a) and coal production thereunder (13a) but denied the indebtedness in the amount alleged. Phillips' several answers asserted the agreements were executed because of duress of United Mine Workers of America, through its members, "by threats of violence and intimidation, forcing the mines to sign and perform their agreements" and that Phillips signed "unwillingly" from fear its mines would not be permitted to operate (13a-14a), that Phillips' employees through coercion, intimidation and fear, were persuaded to become UMW members, and that UMW and large operators cooperated to impose "such financial burdens" on Phillips and "other small operators similarly situated" so as to force them out of business (14-15a).

Inter alia Phillips charged in its Answer and its amendments that UMW and certain large coal producers had conspired, in violation of Sections 1, 2 and 3 of the Sherman Anti-Trust Act (15 U. S. C. A. 1, 2 and 3), to restrain shipments of coal in interstate commerce to force small coal operators out of business so that coal ship-

ments "might be monopolized by the said large operators" (14-15a).

The Answer charged (27a) that the Fund is "entirely dominated by" UMW; that it "is an instrumentality or tool used by" UMW to carry out the conspiracy, "all of which was accomplished with the full cooperation of the" Fund (27a).

Defenses raised under the National Labor Relations Act included allegations that the contract was expressly an integrated contract and that the Union Security Clause in the contract violated 29 U. S. C. A., Sec. 158 (a) (3), in that the Union had not filed affidavits or reports under 29 U. S. C. A., Sec. 159 (f), (g) and (h), which was a prerequisite to insertion of Union Security clauses in contracts before the 1959 Landrum-Griffin Act (17a); that the employees were not members of the Union and did not become members until forced to join by coercion, intimidation and fear under acts violating 29 U. S. C. A., Sec. 158 (b) (18a), that the provisions of the contract pertaining to the Welfare Fund, by their terms and by the way they were administered (including the requirement of Union membership to obtain benefits) violated 29 U. S. C. A., Sections 158 (a) (3), 158 (b) (17), (2) and (3), and 186 (a) and (b) as limited by 186 (c) (5) (22a).

There was a final pre-trial order which fully and completely set forth the theory of conspiracy (50a-56a). This theory will be stated hereinafter.

The Trial Judge submitted two verdict forms to the jury (1577a-1578a, 1588a-1589a). The first verdict form contained one question as follows:

> "Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states, as al-

leged by the original defendant, Phillips Brothers Coal Company?"

The jury answered this question:

"Yes."

The second verdict form contained the following:

"1. Did the cross-defendant, UMW, engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the Anti-Trust Statutes to a labor organization as alleged by cross-plaintiff, Phillips Brothers Coal Company?"

The jury answered:

"Yes."

"2. If your answer to question 1 is 'Yes', was cross-plaintiff Phillips Brothers Coal Company damaged in its business or property as a direct and proximate result of the conspiracy?"

The jury answered:

"Yes."

"3. We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of $90,000.00."

The Trial Court reserved to itself the question of the validity of the contract (1553a).

A difficult question is the significance of the issue presented in the first verdict form above pertaining to the engagement of the Trustees in the conspiracy. The Trial Court considered this a necessary issue for decision on the question of the validity of the contract sued on by the Trustees, and, except for the subject of employee member-

ship in the Union, the Trial Court limited its opinion on the question of contract validity to the insufficiency of proof on the involvement of the majority of the Trustees in the conspiracy (95a-99a). This was so even though the jury answered in the affirmative on ample proof the question on the second jury form as to UMW's carrying on a conspiracy an important part of which was the imposition, by force and by acts contrary to the labor laws, of this contract on the small coal company intended victims, such as Phillips Brothers, known to be incapable of paying the terms. The Trial Court in its opinion, never applied this second part of the jury's determination, in passing on contract validity.

After sustaining the verdict and judgment against the UMW, the Court of Appeals agreed with the action of the Trial Court in setting aside the jury verdict against the Trustees and entering judgment against the Petitioners.

The Court of Appeals held that the existence of the conspiracy participated in by UMW would not make the contract invalid, under the rule in **Kelly v. Kosuga**, 358 U. S. 516.

The Court of Appeals held that the presence of the Union security clause did not invalidate the contract on the authority of **NLRB v. Rockaway News Supply Co.**, 345 U. S. 71, and **Lewis v. Benedict Coal Corporation**, 361 U. S. 459, 468-470.

The Court of Appeals held that the fact that the employees of Phillips did not belong to the Union until after the contract was signed, and until after they were forced to join by force and violence, did not make the contract invalid or unenforceable in this "common law action," even though it might be held not to be binding on the parties under these facts in an unfair labor practice case before the NLRB under the rule in **Garment Workers v. NLRB**, 366 U. S. 731.

STATEMENT OF FACTS.

This statement of facts will, for convenience, consider the facts separately for each of the questions after a recitation of a few general orienting matters.

I. General Facts as to the Phillips Brothers Coal Company, the Contract Signed and the Conspiracy.

Phillips Brothers Coal Company, was, during the entire period covered by this case, engaged in the business of strip-mining coal in Campbell County, Tennessee. This partnership was formed in 1953, by James M. Pennington, Raymond E. Phillips and Burse Phillips. Raymond Phillips was the only mechanic for the stripping equipment and also took care of the paper work and bookkeeping. Burse Phillips directed the work in the strip pit and operated equipment. Pennington took care of the coal tipple (202a, 222a, 230a). There were six or eight employees (175a). The partners originally invested $9,000.00 each in the business (175a).

These three partners continued the partnership through December 31, 1958, at which time the partnership was terminated and a corporation by the same name was formed by the former partners. The successor corporation attempted to continue the strip-mining operation previously carried on by the partnership, mining on the same property and employing the same employees and equipment.

During its lifetime the partnership had the following profits and losses:

1953—$2,438.04 loss
1954—$9,554.00 profit
1955—$28,542.19 profit (206a-207a, 218a-219a)

1956—$17,325.79 profit
1957—$20,385.20 loss
1958—$12,311.28 loss

(Exhibit 13-21; 1591a)

On October 1, 1953, shortly after the partnership commenced its operations, Phillips Brothers Coal Company signed the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, with UMW, which agreement provided that Phillips Brothers Coal Company would pay 40¢ per ton to the Trustees of the United Mine Workers of America Welfare and Retirement Fund on each ton of coal produced by the said company for use or for sale. At the time the contract was signed Phillips Brothers Coal Company had no reason to believe that any of its employees were members of the UMW and no evidence was presented to Phillips Brothers Coal Company by the UMW or any of its agents that UMW represented a majority of (179a) the company's employees. The proof was that the employees joined UMW later (188a-189a, 224a-225a). The contract was signed by Phillips Brothers Coal Company under threat of the use of force and violence by the United Mine Workers of America (178a-179a, 222a-224a).

The partners were assured by the UMW representatives at the time of the signing that they could pay what they could on the Welfare Fund and make their own terms with the employees (179a, 223a). But the partners were dubious of this as this was not put in writing (1466a). The circumstances which compelled the employees later to join the Union are detailed hereinafter. The Company did not check off the Union dues from employees' pay until they did later join the Union (190a, 201a). The Company did pay a part of the Welfare payments from the time the contract was signed but not the full amount (215a). The amount of monthly tonnage which deter-

mined the Welfare payments under the contract is not in question.

A full description of the conspiracy charged was set forth and incorporated in pre-trial order (492-56a). This same description was contained in requested charges and the Court did charge (1538a-1543a) the jury verbatim that the claimed conspiracy was as follows:

"A. Background of the Conspiracy.

"After World War II the economics of the bituminous coal industry became unstable by reason of the fact that there was more coal being produced than the markets required; before 1950 the major coal producers and the Union were in agreement that the major problem of the industry was over-production and that the growth of small, independent and non-Union producers was contributing to the problem; the major companies and the Union disagreed on how the problem should be handled in the period immediately subsequent to World War II; on its side the Union was contending that the answer was to cut down on the working time of all producers; the UMW urged a three-day work week; for many months before the 1950 contract was signed the UMW took the initiative on this question and directed the working time of the men in the industry, the Union Officials setting on some weeks three-day work weeks and at other times no-day work weeks; domination of the men in the industry was an essential part of the Union's effort to dictate the economics of the industry and this domination was interfered with by the passage of the new Taft-Hartley Act; the Union's efforts to maintain closed shops and maintain a Union controlled Welfare Fund were challenged and in some instances were defeated in the courts by the major coal companies; the major coal companies were op-

posed to the UMW's dictating the work time of the men in the industry because it cut into their profits.

"B. Formation of the Conspiracy.

"A marked change occurred in the relations between the UMW and the major coal companies in 1950, as disclosed in their bargaining relations before and after that year; the express understanding at the time of the signing of the 1950 National Bituminous Coal Wage Agreement was that the major coal companies, themselves, were to decide on the working time for their employees; this was a surrender on the part of the UMW of its previous policy of seeking to control the economics of the industry by controlling the working time; the understanding was that the problem of stabilizing the economics of the industry, the problem recognized by both the UMW and the major coal companies, was to be taken care of by eliminating the smaller and weaker companies in great numbers, leaving the industry to the major coal companies alone.

"C. Use of the National Bituminous Coal Wage Agreement in the Conspiracy and Evasion of the Taft-Hartley Act.

"The conspiracy involved the use of the National Bituminous Coal Wage Agreement of 1950, and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; the accomplishment of the purposes of the conspiracy was furthered by the domination of the UMW over the men in the industry and in 1950, by the express statement of the representatives of the major coal companies the Welfare Fund was turned over to the Union's control and rather than opposing the UMW's efforts to evade the Taft-Hartley Act as they had

before, the major coal companies have fostered the UMW's domination of the men of the industry so that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the small mines; by successive amendments to the uniform National Bituminous Coal Wage Agreement's terms the wage scale and the Welfare Fund royalties per ton were raised to exceedingly high levels; the mechanization program of the major coal companies was to go ahead rapidly and the successive increases in the wage scale and Welfare Fund payments were designed and tailored to meet the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs in the successive amendments; the successive amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without affecting their profits, the Union had no concern as to whether the weaker companies could pay; the UMW displayed its knowledge that the weaker companies could not pay and that they would fall by the wayside by reason of the increased terms; the Union favored the taking over of the industry by the combines of coal producers and the Union worked toward this end; the campaign to impose the wage contracts upon the smaller, independent and non-Union mines was intense after 1950; in areas of strong resistance mobs and terrorism were used; the Trustees of the Welfare Fund stood by as pensioners under the Welfare Fund were organized into bands which had as their purpose the imposition of the uniform National Bituminous Coal Wage Agreement upon the smaller and non-Union companies; the paying of Welfare Fund benefits to men in the industry depended upon the retention of membership in good standing in the UMW, certified to by local, District and Inter-

national Union Officials; the enticement of benefits under this Fund was held out to the men in the industry as being under UMW control; the finances of the Union and the finances of the major coal companies have been used to further the drive to bring all production under the National Bituminous Coal Wage Agreement; one or more major coal companies have assisted in crushing the opposition of the principal competitor of the UMW in the bituminous coal labor fields; the result of this conspiracy and these activities has been that large numbers of small companies have been driven out of the industry and that thousands of men in the industry have been driven into unemployment; when these men are put out of the industry they cease to participate in Welfare Fund benefits and the Fund remains as a source of benefit for the employees only of those companies that survive.

"D. Use of Boycotts.

"To accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement to further restrain their trade; companies which could not afford to pay the wage scale in terms of the contract were barred from operating on the lands of signatories to the contract; the major companies have acquired great tracts of the coal lands of the country and there is little good coal land left for the small companies to operate upon; the small companies were prohibited from selling coal to the signatories to the contract, including the major companies which supplied coal to the large markets under large contracts.

"E. The TVA Market.

"The development of the Tennessee Valley Authority as the principal coal purchaser of the entire coun-

try called the attention of the conspirators to the Southern Appalachian region when TVA opened up many of its coal-using generating units in 1954, 1955 and 1956; in 1955 the conspirators manifested their intent and purpose to take over the TVA market by working together with the Secretary of Labor to obtain a determination of a minimum wage in the bituminous coal industry under the Walsh-Healey Act; the purpose was to drive out of the government market, particularly the TVA market, the small coal producers; this determination imposed a wage rate upon a producer of coal supplying coal to a government market twice as high as the wage rate determined by the Secretary of Labor in any other industry; in accordance with this design this determination of a minimum wage effectively barred Phillips Brothers from participating in the term market of the TVA because they could not pay the kind of wages set forth in that determination; because contracts for less than $10,000.00 were exempted from the minimum wage determination, Phillips Brothers was able to ship coal on TVA spot orders; the conspirators set about to eliminate or drastically reduce the spot market of TVA; when this effort failed to bring results the conspirators adopted the practice of predatory pricing to drive the spot coal market price down to a price which a small producer could not meet at a profit; in this phase of the campaign the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, took the most prominent part; the Union had over $25,000,000.00 of risk capital invested in these companies; large amounts of tonnage were dumped upon the spot coal market of TVA at constantly reduced prices; the spot coal price was beaten down to such extent that Phillips Brothers suffered large losses in trying to retain their posi-

tion in that market and finally had to abandon their sale of coal to that market and it became necessary for them to abandon the partnership business.

"F. Enforcement of the National Bituminous Coal Wage Agreement.

"Companies which survived the other onslaughts of the conspiracy have been killed off by such lawsuits as this brought by the Trustees of the Welfare Fund; prior to 1958 some three or four cases were brought by the Trustees against some of the larger producers in the area; cases against the smaller producers were commenced in 1958 and the following period; some forty-one of these cases have been brought and are presently pending against the small companies of the area in the State of Tennessee since January 1, 1958; the amount sued for by the Trustees exceeds the combined profits of the company for its entire life.

"The Union in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests as an organization of wage earners but was aiding, abetting and cooperating with business men in an effort to restrain trade of small coal companies and to monopolize the industry for the major coal companies; the conspiracy involved boycotts and a purpose to stabilize the prices of coal in the industry; the practices used pursuant to the conspiracy particularly the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies, such as that of Phillips Brothers, and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable.

"G. Enforcement of the National Bituminous Coal Wage Agreement Against Phillips Brothers.

"A central part of the understanding and agreement among the alleged conspirators to stabilize prices in the industry, to restrain competition and to monopolize was that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the smaller and financially weaker coal companies with the knowledge and the intent that these companies in large numbers would go out of business because they could not keep pace with the increasingly higher wage and welfare terms which were designed to meet the ability of the large combines to pay as the mechanization program of the latter progressed; the use of the National Bituminous Coal Wage Agreement against the small companies for the purpose of driving them and their employees out of the industry could not be achieved if the employees of these small companies were allowed to exercise the right afforded them by the Labor Statutes; the purposes of the conspiracy were effectuated by the major coal companies permitting the UMW to assume a dominating role over the labor force in the coal fields by evasion of the Labor Statutes which protected the rights of the employees of small companies to join a Union or refrain from joining a Union and to select their own bargaining representatives and which Statutes forbid Unions from dominating Welfare Funds; thereby and pursuant to the intent of the alleged conspirators the employees of the small companies have been deprived of any real choice as to whether they will be represented by the Union or not and whether their bargaining agreement with their employers will be on such a basis that their employers can stay in business and their jobs can be preserved; the effective use of the National Bitu-

minous Coal Wage Agreement to destroy small coal companies and the evasion of the Labor Law is shown by this case brought by the Trustees and by the circumstances of the making of the contract sued on here by the Trustees; in this regard the UMW completely ignored the employees of Phillips Brothers and having no authority from those employees and without having them as members and without their knowledge the UMW extracted the signing of a copy of the National Bituminous Coal Wage Agreement from Phillips Brothers; several months thereafter, and before the employees knew of or had ratified the contract and with the use of mobs and in an atmosphere of coercion directed against the company and its employees, the Union Shop Clause of the contract was enforced by the UMW and the employees were required to join the UMW in order to go back to work; they were not given benefit cards under the Welfare Fund until they did join the Union; it was only under these circumstances that the UMW received any authority or right to act as bargaining representative of the employees of Phillips Brothers."

These theories of Phillips Brothers as to the nature of the conspiracy were fully set out in the Trial Judge's charge to the jury as they are stated hereinabove (1538a-1543a).

II. The Proof as to Whether a Majority of the Trustees Engaged in the Conspiracy.

Assuming that the Trial Court and Court of Appeals were correct in basing the determination of contract validity on the question whether the Trustees engaged in the conspiracy, it is unavoidable that we consider in some detail the proof on this question. The Trial Court set aside the verdict of the jury that the Trustees en-

gaged in the combination or conspiracy. This action of the Trial Court was based on the Court's opinion that there was no proof beyond a suspicion that a majority of the Trustees participated in the conspiracy (96a-98a). The Court stated in its Opinion that there was no evidence that any of the Trustees, other than Mr. John L. Lewis, had any dealings with large coal operators from which it could be inferred that they agreed, combined or conspired to stabilize coal prices in the bituminous coal industry in interstate commerce (97a). The Court further held that the evidence was reasonably clear that Union membership was not a prerequisite for obtaining benefits from the Welfare Fund after 1950, the Court basing this opinion upon the annual report published by the Trustees in 1951, in which the Court stated that Union membership was not one of the requirements of pension benefits listed in said report (97a-98a). The Court also based its opinion upon the denials by Trustees Roche, Schmidt and Lewis and their general counsel, Val Mitch (98a). The Trial Court held that the evidence was insufficient to show that the Trustees instituted suits for the purpose of eliminating small operators, resting this opinion upon testimony of Trustees Roche and Schmidt that the matter of institution of suits was left in the hands of Counsel Mitch for the most part (98a). The Court held that the evidence was insufficient to show that a majority of the Trustees required pensioners to picket for the UMW in order to obtain or retain benefits of the fund (98a). The Court held that the evidence was insufficient to show the Trustees held out to industry employees that the Fund was under Union control, resting its opinion upon the Trustees' testimony that the Union did not dominate or control the Fund (98a). In setting aside the jury verdict as to the Trustees' participation in the conspiracy, the Court held that the circumstances surrounding the Trustees' participation in the

conspiracy were suspicious but that the evidence was not substantial enough to warrant the jury verdict (98a).

As shown above, the Trial Court relied primarily upon the fact that there was no substantial evidence that any of the Trustees, other than Mr. John L. Lewis, had any dealings with large coal operators from which it could be inferred that they agreed, combined, or conspired to stabilize coal prices in the bituminous coal industry in interstate commerce. This was a misconstruction by the Trial Court of Phillips Brothers' theories pertaining to the use of the Welfare Fund by the UMW as an instrument to accomplish the purposes of the conspiracy and the role played by the Trustees in allowing the Fund to be so unlawfully used. Phillips Brothers did not allege or attempt to prove that the Trustees, other than Mr. Lewis, who was both chairman of the Board of Trustees and President of the UMW, themselves directly dealt with the large coal operators to reduce the number of coal producers and stabilize coal prices. Trustee participation could be accomplished by the majority of the Trustees taking a do-nothing attitude with reference to the Union uses of the Fund as well as by overt acts.

The theories of Phillips Brothers as to the nature of the conspiracy, as set out in the Pre-Trial Order and submitted to the jury in the Trial Court's charge, are set out above in their entirety.

Quite aside from the jury verdict against the Trustees, the jury found, in its verdict against the UMW which was sustained by the Court, that the type of conspiracy alleged by Phillips Brothers did exist. In its verdict against the UMW, the jury found that the larger coal operators turned over the control of the Welfare Fund to the UMW in 1950 by giving to Mr. John L. Lewis two other Trustees (previously referred to by the coal company conspirators as "stooges" (541a) who would cooper-

ate with him in using the Welfare Fund provisions of the contract as a prime instrument of the conspiracy. The jury found that, by the UMW's control over the Welfare Fund, the UMW could hold the benefits out to the men in the industry as a method of raising mobs for the purpose of boycotting coal markets, forcing the sale of small companies to major coal combines and imposing the contract upon the small coal operators without giving the employees the right to self-determination as to Union membership as is required by the National Labor Management Relations Act of 1947. The jury found that the terms of the conspiratorial agreement could be carried out by UMW representations of control over the Welfare Fund and through the do-nothing cooperation of the Trustees of the Fund. It was unnecessary that it be shown that the Trustees physically and directly entered into a conspiratorial agreement with the large coal operators to stabilize prices in the industry. It was sufficient to show that there was domination and misuse of the Fund by the UMW, unopposed by the Trustees, and that by the enforcement of the terms of the National Bituminous Coal Wage Agreement by the Trustees in bringing suit such as this under such facts as existed here, a cooperation with, or a subordination to, the UMW existed in administering the Fund against the interests of the large number of beneficiaries of the Fund who were employed by the small coal operators. The conceded policy of enforcement of the Welfare Fund royalty provision of the contract without regard to how the individual contracts came into existence and without permitting any settlement short of bankruptcy was consistent with the terms of the conspiratorial agreement.

The UMW admitted that benefits under the Welfare Fund were paid only to UMW members until 1950, (340a-343a) although Section 302 of the Labor Management Relations Act of 1947 (29 U. S. C. A., Sec. 186) made it

unlawful for a Union to control a Welfare Fund and prohibited terms in a bargaining agreement which encouraged Union membership (29 U. S. C. A., Sec. 158a (3)). The UMW contended, however, that in 1950 the Welfare Fund was granted its independence from the UMW (340a-343a). The jury in its verdict against UMW, however, found that UMW control of the Fund continued throughout the period embraced by this lawsuit. The evidence supporting the jury's verdict is abundant, as the following paragraphs will show:

A. The Attitude of Mr. John L. Lewis, Chairman of the Board of Trustees, With Respect to the UMW's Control Over the Welfare Fund.

Mr. Lewis was asked in his deposition given in this case if he did not realize in the period of 1947 up until the contract of 1952, that the running of the Welfare Fund by the Union, itself, would be illegal, and his answer was "No." He was then asked:

> "Was it your concept all the way through that the Welfare Fund could properly be operated by the Union?
>
> "Certainly" (277a).

Mr. Lewis later said that it was merely a matter of negotiation so far as he was concerned (277a-278a). This was the first time in this case that Mr. Lewis was confronted with the question of control of the Fund by UMW, and his response on this occasion was therefore entitled to persuasive weight so far as the jury was concerned and could be weighed more heavily than later efforts of the UMW and the Trustees during the trial of this case to picture Mr. Lewis as a passive Trustee, merely taking advise from Miss Roche, the so-called neutral Trustee, so far as the management of the Welfare Fund was concerned (1060a-1061a).

B. The Plan Established by the UMW Prior to 1950 to Maintain Control of the Welfare Fund.

Before 1950 the UMW had openly set up a plan to keep control of the Welfare Fund. This was shown by the following evidence:

1. Before 1950 the benefits of the Fund were paid exclusively to UMW members and the resolution requiring UMW membership was printed in full and widely disseminated to the men throughout the industry (339a-342a, Exh. 33).

2. A system was devised to keep non-regular members from participating in the Welfare Fund benefits, using two methods:

a. In the 1948 UMW Convention the initiation dues were increased. The reason for this was to bar the part-time miners who would come into the industry for seasonal occupation and who would draw benefits from the Welfare Fund (283a-286a).

b. An International Membership Committee was established in 1948 (289a-290a). The establishment of this was part of the procedure set up whereby the Welfare Fund applications were processed through the UMW organization and into the hands of the Welfare Fund for the purpose of preserving the status of membership which carried with it valuable rights (372a-375a).

3. Pensioners under the Welfare Fund were required to maintain their UMW membership. This was accomplished by amending the UMW Constitution in 1948 to require the retired miners under pensions to maintain their membership and pay dues to the UMW (287a-289a).

4. Local and District officers of the UMW processed the Welfare Fund Forms, including the applications for benefits (286a-287a).

C. The UMW Sought to Name and Control the Trustees of the Welfare Fund in the National Bituminous Coal Wage Agreement in 1950.

1. Fights Between Mr. Lewis and Mr. Ezra Van Horn and Between Mr. Lewis and Senator Styles Bridges Prior to 1950.

Even though the UMW controlled the Welfare Fund prior to 1950 by the above-named devices, Mr. Lewis had a long and bitter fight with respect to how the Fund should be managed with Mr. Ezra Van Horn, the Operators' Trustee under the 1948 National Bituminous Coal Wage Agreement (268a-270a, 281a-282a, 536a) and also disputes from time to time with Senator Styles Bridges, who was named to the Board of Trustees in 1948 as the neutral Trustee (298a, 300a).

2. Fight Between Mr. Lewis and Judge Charles I. Dawson in the Years 1949 and 1950.

In September, 1949, Mr. Van Horn resigned as the Operators' Trustee. Mr. Lewis admitted this (295a) and confirmed the exchange of telegrams between Mr. Van Horn and himself, which telegrams were exhibits to the deposition of Judge Charles I. Dawson (296a, 524a-525a). Upon the resignation of Mr. Van Horn the operators representing 51% of the tonnage of coal in the industry, as required by the 1948 National Bituminous Coal Wage Agreement, named Judge Charles I. Dawson as the Operators' Trustee. Mr. Lewis admitted this fact (294a, 296a). Mr. Lewis, as Chairman of the Trustees, refused to recognize Judge Charles I. Dawson as a Trustee (297a, 522a-523a, 1082a). The telegrams exhibited by Judge Dawson to his deposition and confirmed by Mr. Lewis as being the telegrams exchanged between Mr. Van Horn and himself (524a-525a)

showed that Mr. Van Horn had resigned; that he had notified Judge Dawson of the latter's appointment and had notified Judge Dawson of the meeting already scheduled for November 21, 1949 (525a). Mr. Lewis also testified that Judge Dawson attended two meetings of the Board of Trustees and that he assumed there were minutes of those meetings. Counsel for Phillips Brothers requested that these minutes be produced but none were forthcoming (297a-298a).

Mr. Lewis later testified that Judge Dawson was given two informal hearings and that no business of the Fund was transacted at these meetings (1121a-1122a). His testimony at this point was that Judge Dawson was merely given an opportunity to talk with respect to the question of seating him as a Trustee.

Mr. Val Mitch, General Counsel for the Trustees, testified that Judge Dawson had asked for the meetings; that Mr. Lewis had not called the meetings; and that no business was discussed except the seating of Judge Dawson and that this was the reason why there were no minutes of these meetings (1088a).

The telegrams between Mr. Lewis and Mr. Van Horn, show that the meeting of November 21, 1949, the first of the two meetings attended by Judge Dawson, had already been scheduled by Mr. Lewis as a regular meeting of the Board of Trustees (524a-525a).

Judge Dawson testified that he was appointed by the operators as Trustee after Mr. Van Horn's resignation. Judge Dawson stated that Mr. Harry Moses, who was acting for the operators in the contract negotiations then taking place with UMW, called him and told him that the operators wanted him to serve. Judge Dawson informed him that he wanted to have three questions cleared up before he accepted the appointment. He met with Mr.

Moses, Mr. Amos and Mr. George Love, the last two representing Consolidation Coal Company (520a). These questions were ironed out (1004a), and he accepted the appointment on November 5, 1949 (519a).

Judge Dawson attended his first meeting of the Board of Trustees on November 21, 1949 (521a), the regular meeting of the Trustees of which he had been notified by Mr. Van Horn. He testified that at this meeting Mr. Lewis instructed the Secretary of the meeting, Mr. Mitch, not to recognize anything that Judge Dawson said and not to take down any motions which he made or votes which he cast (522a). Mr. Lewis refused to recognize Judge Dawson at the second meeting which was held December 2, 1949 (523a). Mr. Lewis was contending that Mr. Van Horn had submitted a qualified resignation as Trustee and that, even though Judge Dawson had been certified by the operators representing 51% of the tonnage in the industry, the Trustees had the right to pass on a new Trustee (299a-300a, 1121a). Mr. George Love, however, confirmed in his testimony that Mr. Van Horn resigned September 14, 1949 (539a). Judge Dawson testified that he consulted with Mr. Love and Mr. Moses about the treatment which he was receiving at the hands of Mr. Lewis and that they insisted that he take action in the courts (525a). In accordance with their wishes a lawsuit was commenced (525a). Judge Dawson testified that the next occurrence was the signing of the 1950 National Bituminous Coal Wage Agreement on March 5, 1950. This contract, finally negotiated with Mr. Lewis by Mr. Love, named Mr. Charles Owen as the operators' Trustee of the Fund instead of Judge Dawson without any prior notice to Judge Dawson that this was going to be done (525a-526a). Judge Dawson had previously notified Mr. Moses and Mr. Love of the pending lawsuit, but he testified that because they had been so treacherous toward him he felt

no reason to continue the lawsuit after the 1950 contract was signed (526a-527a).

Judge Dawson testified that he did not intend to accept any compensation from the Welfare Fund for service as the Operators' Trustee, but rather, he intended that his compensation come from the Operators (529a) just as Mr. Lewis' compensation as the UMW Trustee has always come from the UMW (1120a). However, during the entire period that Mr. Owen served as the Operators' Trustee (from March 5, 1950, until his death on July 20, 1957) his compensation was paid by the Welfare Fund itself. His salary was $35,000.00 per year (1053a), an amount which Mr. Schmidt, his successor Trustee, testified was an exorbitant and unreasonable amount for merely attending four or five meetings each year (1053a-1054a, 1062a).

The Trial Court, in setting aside the jury verdict as to the Trustees, made no reference to Judge Dawson's testimony. However, the jury was entitled to put full faith and credit upon the testimony of this former United States District Judge and was fully justified in concluding that Mr. Lewis' actions were motivated by the purpose of preventing a strong man like Judge Dawson, who would not tolerate the continued UMW control of the Welfare Fund, from being seated as Trustee and causing the operators to appoint a "stooge" as their Trustee who would cooperate with Mr. Lewis in allowing the UMW to continue in control of the Fund.

3. **The Naming of the Operators' Trustee and the Neutral Trustee Was an Issue in the Negotiations of the National Bituminous Coal Wage Agreement of 1950.**

The jury had the benefit of evidence from statements and testimony of Mr. George Love. During the 1949-50 negotiations, which culminated in the 1950 contract, Mr. Love, chief negotiator for the operators stated publicly

that the UMW was attempting to name stooges of its own choice on the Board of Trustees as operators' Trustee and as neutral Trustee (292a, 541a). In his deposition in the present case Mr. Love admitted that the identity of the Trustees on the Welfare Fund was an issue in the 1949-50 negotiations (541a), even though this was not a proper issue for negotiation under the National Labor Relations Act, as amended, which Act (29 U. S. C. A., Section 186c) strictly requires that the employers name a Trustee, that the Union name a Trustee and that these two Trustees select a neutral Trustee. Moreover, on March 5, 1950, a few minutes after the 1950 contract was signed, Mr. Love, in the presence of Mr. Lewis, stated the following with respect to the Welfare Fund: "The responsibility is clearly on the shoulders of the Union, and if it fails, the public and ourselves will look directly at the Union" (347a, 547a-548a).

In the light of this evidence the jury was completely justified in finding that, in the conspiratorial agreement entered into in 1950, between the UMW and the large coal operators the quid pro quo for the UMW's acceptance of the large Operators' plan for stabilizing prices in the industry was the agreement by the large operators that without further contest the Welfare Fund would remain under the domination of the UMW.

4. Mr. Lewis Was Successful in 1950 in Obtaining Two Trustees Who Would Cooperate in the UMW's Continued Control Over the Welfare Fund.

The negotiators of the 1950 contract named in the contract, itself, Miss Josephine Roche to be the neutral Trustee of the Welfare Fund, replacing Senator Bridges. (Compare Section 302 of the Labor Management Relations Act of 1947 (29 U. S. C. A., Sec. 186) which specifies that the neutral Trustee be selected by the Union Trustee and the

Employer Trustee.) In an affidavit filed in the early stages of this case Miss Roche stated that prior to her appointment as neutral Trustee she had no previous connection with UMW (348a-349a). As the case developed, however, the UMW admitted that in 1946 the UMW purchased 222,000 shares of stock in the Rocky Mountain Fuel Company of which Miss Roche was president and chief owner (674a). Miss Roche testified that her father was president of the company before her and that the company was in financial difficulties (1011a-1012a). In 1947, one year after the UMW's purchase of stock Mr. Lewis employed Miss Roche as his personal special assistant in his position as Trustee of the Welfare Fund (351a). In 1949, Miss Roche was made director of the Fund at a time when it was operated exclusively for UMW members, a position which Miss Roche continued to hold to the present time in conjunction with her position as the so-called neutral Trustee (350a).

The UMW was successful in having Miss Roche, "President of Rocky Mountain Fuel Company" named as "neutral Trustee" in the scattered 1949 contracts which the Union was able to close before the major operators came to terms in March, 1950. This is shown by the chronological history in the Supplemental Appendix under the date of December 6, 1949. This was at the same time that the representatives of the major companies contended that the UMW was trying to name "stooges" as Trustees (540a-541a).

There was, therefore, ample evidence to support the jury's conclusion that Miss Roche and Mr. Owen were the two stooges that Mr. Love had stated in 1950 that Mr. Lewis was attempting to put on the Board along with Mr. Lewis, himself.

The practical insignificance of the position of Operators' Trustee since 1950 was plainly shown in the testimony

of Trustee Henry G. Schmidt, wherein it was shown that, upon Mr. Owen's death in July, 1957, a successor Trustee was not appointed until May, 1958, a period of some ten months, during which time the Fund collected and expended approximately $100,000,000; that the larger operators exhibited no particular interest in being represented on the Fund that was handling such huge sums of money, and Mr. Schmidt finally was forced to accept the position himself (1054a, 1061a, 1063a).

D. **The Conduct of the Welfare Fund Since 1950 Has Been Consistent With the Policy of the UMW to Dominate the Welfare Fund as an Instrument of the Conspiracy to Restrain the Trade of Small Coal Companies.**

The record in this case contains abundant proof to support the jury's verdict that the means adopted by the UMW to dominate the Welfare Fund prior to 1950, as set out hereinabove, have been continued since 1950 and that such means have been a prime instrument to carry out the conspiracy to restrain the trade of small coal companies entered into between UMW and the large coal companies of the country.

1. **All Means Adopted by the UMW Prior to 1950 to Insure UMW Membership as a Prerequisite for Obtaining Welfare Fund Benefits Have Continued Since 1950.**

After 1950 the contracts continued to fail to set forth the detailed basis upon which Welfare benefits were to be paid as required in 29 U. S. C. A., Sec. 186 (c) (5) (B). Such basis is left up to the Trustees. Compare **United States v. Ryan**, 350 U. S. 299, 304-305, and the legislative history referred to there.

The continued requirement since 1950 of UMW membership as a prerequisite for obtaining Welfare Fund benefits is shown by the following evidence:

a. Statements made since 1950 by the Chairman of the Board of Trustees and by the General Counsel for the Trustees conclusively show that the Trustees have continued to interpret the contract as requiring UMW membership for obtaining Fund benefits. In October, 1952, two and one-half years after the UMW claims the Welfare Fund was granted its independence, Mr. Lewis, Chairman of the Board of Trustees, made the following statement at the 1952 UMW Convention:

> "Based upon present computations governing the life expectancy of individual members, $18,000.00 will be paid on the average under each pension award. Certainly we cannot continue to pay out that $18,000.00 over a long period of years without fully protecting the legal membership of that individual and causing him to maintain his constitutional membership in this organization."

In his deposition Mr. Lewis was asked about this statement. His answer was: "Those statements were predicated upon the conditions existing at that time and are not necessarily the law and the prophets in 1961."

Mr. Lewis was then asked: "But this was 1952, after the signing of the 1950 contract?" Mr. Lewis replied: "Exactly so, exactly so. But that whole question has been clarified since that time" (379a).

There was no effort made by the Trustees to show that this question was clarified at some time subsequent to 1952. On the contrary, the Trustees stubbornly insisted that the question had been clarified on March 5, 1950, when they say the Fund was liberated from the UMW (340a-343a, 1026a, 1119a). However, this insistence on the part of the Trustees should be compared with Exhibits 35 and 36, portions of which were read into the record in this case (363a-365a). Exhibit 35 is an article appearing

in the United Mine Workers Journal, dated May 15, 1950, reporting a meeting of UMW District Officers at the Welfare Fund office in Washington, D. C., where Miss Josephine Roche, Trustee and Director of the Welfare Fund, explained how to process the application for pension forms of the Welfare Fund (363a-364a). Particular attention should be directed to Exhibit 36, which is an article appearing at pages 3 and 4 in the United Mine Workers Journal, dated July 1, 1950, reporting the fact that Miss Josephine Roche had mailed to UMW District Officers new forms for obtaining hospitalization benefits from the Welfare Fund, together with instructions on how these forms were to be processed. This information mailed by Miss Roche states that these hospitalization benefits are available to members of the UMW and that in the event that a miner no longer is a member of the UMW in good standing he must turn his hospitalization authorization card (Form 85-HS) in to his local union (365a-366a). This action on the part of Miss Roche was taken four months after March 5, 1950, the date on which the Trustees now claim that the Welfare Fund was granted its independence from the UMW.

Mr. Val Mitch, General Counsel for the Fund, who furnished the legal advice to the Trustees, testified in a case in the United States District Court for the District of Columbia as late as 1956 that he construed the contract as follows: "I read it that 'all of the foregoing benefits are to be made available to members of the Mine Workers who are employees of the operators' signatory,' I don't think it could be any other way, in my opinion" (345a-1083a).

Mr. Thomas A. Kennedy, Vice President of the UMW during the period covered by this case and currently President of that organization, referred to the Welfare Fund in a speech to the 1956 UMW Convention as being the

"Welfare Department of the United Mine Workers of America." Mr. Lewis characterized this as a slip-of-the-tongue (382a).

b. The International Membership Committee established in 1948 for processing Welfare Fund applications (372a-373a) continued to function after 1950 and Mr. Lewis testified that the Committee continues to function at the present time (374a-376a). Vice President Kennedy pointed out in 1952 that the work of this Committee was important in maintaining the integrity of the UMW membership which had "become very valuable" (375a). Mr. Lewis had estimated the average value of membership under Welfare Fund pension benefits alone at $18,000 per man (379a).

c. Pensioners under the Welfare Fund were required to retain their membership in the UMW and pay UMW dues after 1950. Mr. Lewis had made an address to the UMW Convention in 1948 stating that the requirement that the pensioners pay dues to the UMW was because of the "numerous statutory provisions and the punitive provisions of the Taft-Hartley Act, whether a man who pays nothing in the form of dues for an extended period of time to the organization could maintain a legal relationship and be adjudged a legal member (288a). This question of dues of retired pensioners under the Welfare Fund was raised at the 1952 UMW Convention by some of the delegates (377a-380a), and Vice President Kennedy explained that the dues were necessary "in order to legalize beyond any question of doubt the membership of these individuals" (378a).

The question was never clarified in the record as to the origin of this erroneous interpretation of the law that the Taft-Hartley Act requires pensioners under a Welfare Fund to retain their Union membership.

This theory was not advanced by opposing counsel in this case. Rather they contended there was a complete change of policy in 1950 about the requirement of Union membership under the Welfare Fund when the Courts had passed on that question (344a).

Nevertheless, these statements by the UMW officers about the requirement of retaining Union membership made quite an impression upon the UMW membership, as shown by the statement of delegate Morris at the 1952 Convention, where he stated:

> "It would not be healthy for our delegation not to get up and speak on this issue at this Convention. When it came time for resolutions to be drawn to be sent to our International Secretary-Treasurer, the old men asked the Resolutions Committee to cut the dues. We told them and quoted from the proceedings of our last Constitutional Convention to the effect that our great leader, John L. Lewis, settled a big argument that it was only due to the punitive measures of the Taft-Hartley Act that we had to charge something and the dollar was the least we could charge" (380a).

The question was again raised by some of the delegates at the 1956 UMW Convention and this same representation was repeated to the membership by Mr. Lewis that there was a legal requirement that the pensioners retain their Union membership (381a).

d. The report of the UMW officers to the 1952 UMW Convention contained the following statement under the heading "UMWA Welfare and Retirement Fund":

> "Determination of the eligibility of an applicant is the sole responsibility and function of the Fund, with the one exception of certification of Union membership, which is strictly the province of the Union" (359a).

Mr. Lewis attempted to explain this statement by testifying, in substance, that the integrity of applications was judged by the Welfare Fund upon the basis of certification of the Union membership by the Union officers (360a-361a).

e. The Welfare Fund application for benefit forms continue to contain spaces for certification of membership in good standing in the UMW. These Welfare Fund forms are set forth in the record at 357a-359a, introduced as Exhibit 34 (357a). There are numerous spaces on these forms for certification by UMW Local, District and International officers of membership in good standing and spaces for the seals of the respective UMW organizations. If an applicant writes directly to the Fund he is sent a form asking for his Local Union number (1087a).

f. Hospitalization benefits are paid only to employees of signatory operators who are members in good standing of the UMW. This fact is apparent from the Welfare Fund form entitled, "Request for Changes on Form 85-HS," which deals with the hospital card given to beneficiaries by the Welfare Fund, which card authorizes its holder to receive hospitalization benefits from the Fund. This form is part of Exhibit 34 (1606a) and is referred to at 359a. This form requires a change on the card or a surrender of the card for any one of the following situations: (1) The member has died; (2) the member has married or remarried; (3) the miner is no longer a member of the United Mine Workers of America. If a miner is no longer a member in good standing of the UMW he must return the hospital card to the Local Union (366a).

g. The Trustees have maintained the Resolutions of the Board of Trustees in secrecy since 1950. Before 1950 the Resolutions of the Board of Trustees, which formally required UMW membership to participate in benefits of the Fund, were reported and quoted verbatim in such publica-

tions as the United Mine Workers Journal (339a-342a). Since 1950 there has been no publication of the Resolutions in the United Mine Workers Journal (342a-344a). Even in his testimony in this case Mr. Mitch did not introduce a copy of the Resolutions of the Trustees, but, rather, he submitted as Exhibit 141 a "List of requirements for eligibility for benefits" (1074a). Resolutions of the Trustees are not available to the public and are not even available to applicants who write to the Fund (1086a). The Trustees will not show the Resolutions to anyone (1086a). The last time the men in the industry were given an opportunity to see for themselves the eligibility requirements of the Fund was before 1950, when UMW membership was admittedly a requirement for receiving Fund benefits. [Compare 29 U. S. C. A., Sec. 186 (c) (5) B, which requires that the contract itself set forth the detailed basis for payments.]

h. Statements in the annual reports of the Trustees contained illusory language with respect to UMW membership. The Trustees put great stress in this case upon certain language contained in the elaborate annual reports prepared each year by the Welfare Fund and it was upon these reports that the Trial Court largely based its opinion that it is reasonably clear that UMW membership was not a requirement for obtaining Fund benefits. The language contained in these reports is found at 1030a-1031a. The language quoted at page 1030a is:

> "No benefit is authorized **solely** on the basis of Union membership." (Emphasis added.)

It is apparent from this language that membership is a requirement, but is not the **only** requirement. The language relied upon by the Trustees at 1031a is:

> "Trust fund benefits are not authorized on the basis of Union membership, but only in conformity with Trustee regulations."

It is again apparent that UMW membership will not alone obtain the benefits but that there are more restrictive requirements than simply membership. This was the only evidence that the Trustees introduced to show that they had cleared up any misunderstanding among the employees in the industry about this subject. Moreover, these annual reports are not distributed to the employees in the industry (1029a).

i. There is a broad general understanding among the men in the industry that UMW membership is a requirement to obtain fund benefits. Mr. Mitch, General Counsel for the Fund, testified that suits were being filed against the Fund wherein claims were being based solely upon UMW membership (1079a). On cross-examination he testified that there were many of these suits being brought all over the nation (1090a). This is a clear indication of a broadly held view by the employees in the industry that membership is the basis upon which benefits are paid. Phillips Brothers' employees were under the impression that they were required to join the UMW in order to receive hospital cards (969a, 979a). Phillips Brothers' employees did not in fact receive hospital cards from the Fund until after they joined the UMW on April 25, 1955, even though Phillips Brothers had been a signatory to the contract since October 1, 1953 (974a, 979a, 982a). One employee, Arvin Hutson, had a hospital card when he went to work for Phillips Brothers in October, 1953, but he was required to turn it in after he let his UMW membership drop (976a).

The Court's attention is invited to Exhibits 138-143, the six files that the Trustees brought in, out of the thousands on file, attempting to show that pensions were awarded to non-union members. We ask the Court to consider particularly letters found in Exhibit No. 142 which perhaps

illustrate more accurately than any other evidence how the Trustees have allowed the impression to permeate the industry that Union membership is a prerequisite for obtaining benefits from the Welfare Fund (1699a-1700a, 1701a-1702a). Note that the first letter, dated March 19, 1958, from Bartha Mae Taylor to Mr. Lewis stresses the fact that her husband continued to pay his membership dues to the UMW, even though it was a great hardship to do so, after he lost his job, in order that he would be eligible to receive benefits from the Fund. He continued to pay these dues until there was absolutely no money left. After receiving a reply from Trustee Roche, who did not enclose any application forms (1700a), Mrs. Taylor wrote to Trustee Roche a letter dated April 15, 1958, in which she went to great pains in setting out all the dues paid by her husband to the UMW after losing his job and informing Trustee Roche that her husband could not obtain application forms from his local union without first paying $70.00 (1701a-1702a). Mrs. Taylor pleaded with Trustee Roche to send Fund application forms which was done (1702a). It finally took a letter from U. S. Representative Elizabeth Kee one year later to obtain the pension from the Welfare Fund (1706a-1707a). The pension was granted two days after Rep. Kee's letter. At no place in the file is it shown that Mrs. Taylor was advised that payment of Union dues was not necessary to obtain benefits. These letters from Mrs. Taylor are examples of the letters which the Trustees were receiving as shown in the other five files. The presence of such an impression in the industry would not have been tolerated by trustees who were more interested in the welfare of the beneficiaries of the Fund than in making the Fund subservient to the purposes of the Union.

j. The Trustees have failed to clear up any understanding among the employees in the industry that UMW mem-

bership is a requirement for Fund benefits. The Trustees filed answers to interrogatories in this case in which they stated that they were not advised that there was any such broadly held view in the industry (384a). However, Mr. Mitch, General Counsel for the Fund, finally stated in his testimony that the Trustees had done what they could to clear up the impression (1091a), but no evidence whatsoever was introduced to show that the Trustees have done anything in a practical way toward clearing up this broadly held understanding that membership is a requirement for receiving Fund benefits.

k. In spite of the Trustees' insistence that the Welfare Fund pays benefits to non-Union employees of signatory operators, the Trustees produced no documentary evidence to support this assertion. Interrogatories were addressed to the Trustees asking for information as to one non-Union employee who had ever received a pension from the Welfare Fund. This interrogatory was objected to on the ground that it was oppressive and that it would cause too much work to find such a name (368a-369a). Another interrogatory asked if there were any persons who had received a pension in the years 1956-1957 who were non-Union employees and the same objection was interposed (369a-370a). Another interrogatory asked for the name of any non-Union beneficiaries in District 19, UMW, and the same objection was interposed (371a). However, Mr. Mitch, Counsel for the Fund, testified that non-Union men frequently are awarded benefits and that there are a substantial number of these in the Trustees' files (1076a-1077a).

Finally, at the trial, and without having disclosed these to Counsel for Phillips Brothers in spite of the previous interrogatories, the Trustees introduced the six files, heretofore referred to which they claimed contained the names of non-Union beneficiaries (1033a-1043a, Exhs. 138-143).

One of these files (Exhibit 141) contained an application filed November 5, 1958; another (Exhibit 142) contained an application filed May 28, 1958; and a third file (Exhibit 143) contained an application filed December 1, 1960 (1042a-1043a). The applications in all three of these files were filed after the issue was raised in this lawsuit with respect to UMW membership being a requirement for receiving benefits. For this reason the contents of these three files were never fully revealed to the jury. These files as printed in the Appendix do reveal that each of these three applicants was a member of UMW when he left the industry and their letters show that each considered it necessary to explain that he was unable because of unemployment to continue paying Union dues after leaving the industry (1694a-1712a).

With respect to the other three files (Exhibits 138, 139 and 140) the contention of Phillips Brothers, that UMW membership was a requirement for receiving Fund benefits, was amply shown. Exhibit 138 showed that the applicant was no longer employed in the industry but that he was a UMW member at the time he left the industry. It showed that the Trustees ignored his application until he hired an attorney and that the Trustees then turned his file over to Mr. Mitch, their General Counsel, and left the decision with him as to whether or not the pension would be awarded (1516a, 1675a-1676a). In view of the fact that no other reason that the pension should not be awarded appeared in the file, the jury was justified in its conclusion that Mr. Mitch determined that it would be better to pay the pension quietly rather than risk a lawsuit over the Trustees' refusing to pay a pension to a retired miner who had allowed his membership to drop since leaving the coal industry. Exhibit 139, the second file, revealed that the applicant was a UMW member at the time he made application for benefits (1517a-1518a, 1678a-

1680a). Exhibit 140, the third file disclosed that the applicant was sent forms of the Welfare Fund requiring him to fill in blanks with respect to his Union membership and requiring certification of membership in good standing by the UMW officers. When he returned these forms to the Trustees blanks were not filled in. The Trustees then sent these forms to the District Office of the Union to have them certify that the applicant was a member in good standing. The District then wrote to the applicant informing him that he should address the Trustees directly (1519a, 1684a-1687a). The jury was amply justified, from this series of rather involved correspondence regarding UMW membership in good standing, in reaching its conclusion that the Trustees were fully cooperating with the UMW by doing their utmost to discourage non-Union men in the industry from applying for the benefits which they had a right to receive, and at the same time avoiding a lawsuit which might result in enlightening the men in the industry that the law requires the Trustees to pay benefits to all employees of a signatory operator, regardless of Union membership.

None of these files deal with the question of hospitalization benefits. They all deal with pensions. The Trustees did not even attempt to produce any documentary evidence that a single non-Union employee of a signatory operator ever received hospitalization benefits from the Fund (1520a).

2. Pensioners Under the Welfare Fund Have Been Organized to Carry Out UMW Activities in Accordance With the Conspiratorial Agreement.

There was ample evidence to support the jury's conclusion that the UMW effectively controls the Welfare Fund and uses this control to force the National Bituminous Coal Wage Agreement upon the small coal operators

who would not voluntarily sign the agreement whose terms they cannot afford to pay; that pursuant to the terms of the conspiracy between the UMW and the large coal operators the contract has been imposed on the small operators by the use of mobs which the UMW has been able to raise by holding the benefits of the Welfare Fund over the heads of the men in the industry as an enticement. That the UMW has succeeded in organizing pensioners under the Welfare Fund into picket duty and mobs is repeatedly acknowledged by the UMW.

a. Every pension awarded by the Trustees contains the following provision in bold-faced print:

> "Subject to the termination at any time by the Trustees for any matter, cause or thing of which they shall be the sole judges and without assignment of reason therefor" (1520a).

As shown hereinabove, Mr. Lewis, Chairman of the Board of Trustees of the Welfare Fund, convinced the UMW membership, in his capacity as President of the UMW, that the law required pensioners to retain their UMW membership and the UMW Constitution has in fact so required since 1948 (290a). The jury was entitled to its reasonable conclusion that this bold-faced printed termination provision was calculated to, and did in fact, have a strong effect upon pensioners with respect to their obligation to the UMW.

b. Organized pension committees of pensioners under the Welfare Fund held regular meetings and conducted organizing drives under the guidance of the Presidents of UMW Districts (422a-426a). Such activities were carried on to bring the non-Union coal miners into the UMW (424a). Bands of one hundred to three hundred of these retired men were organized to picket and to hand out leaflets in freezing temperatures for long hours in connection with

efforts to boycott power companies that bought non-Union coal (425a-426a). These retired men were organized into picket lines for as long as two years, rain or shine, hot or freezing (425a-426a).

c. The organized pensioners have been used to force the small companies to sell out to the major companies. Organized pensioners were used to force the non-Union Banner Fuel Corp. to sell out to Clinchfield Coal Corporation, Division of Pittston Company, one of the UMW's co-conspirators (426a, 692a-693a).

d. Organized pensioners have been used to boycott coal markets supporting non-Union operations. Organized pensioners were used against Monongahela Power Company to compel it to patronize Union coal mines (425a-426a).

e. The Trustees have done nothing to stop the organizing of pensioners to carry on the drudge work of organizing drives. Mr. Lewis, Chairman of the Board of Trustees, testified that he knew about the organized pensioners' activities but that he did not know about it or discuss it in his capacity as Trustee of the Welfare Fund (426a). He said that the Trustee did nothing about it (427a). Trustee Schmidt testified that the matter of organized pensioners had never been discussed by the Trustees (1059a). Mr. Mitch, General Counsel for the Trustees, who attended all of their meetings, testified that there had never been any discussion about organized pensioners in his presence (1078a). At another place in the record, Mr. Lewis testified that when this matter **was discussed** by the Trustees it was concluded that there was nothing that they could legally do to prevent the men from engaging in these activities (427a).

This testimony is as follows:

"Q. Was any effort made by the Trustees of the United Mine Workers of America Welfare and Retire-

ment Fund to sever these pensioners from Union activities?

"A. Certainly not. They had no jurisdiction in the premises.

* * * * * * * *

"Q. Is it part of the program——

Mr. Kramer: Wait just a moment.

"Mr. Combs: I would like for you to read the rest of that answer.

Mr. Rowntree: All right.

(The reading of the deposition was continued.)

Mr. Combs: And I might point out for the record that I think it would have been a violation of the law if they had.

The Witness: Certainly. **As I previously pointed out when they were discussed by the Trustees.**" (Emphasis added.)

The jury was certainly entitled to conclude that the very least that the Trustees could have done would have been to have widely disseminated to the men in the industry the requirements of obtaining benefits from the Fund, as they did prior to 1950, especially the fact (if it be a fact) that, under the Fund resolutions, UMW membership had no bearing whatsoever upon their rights to receive benefits. The Trustees certainly missed an opportunity when they failed to make this explanation to Mrs. Bob Taylor and the other applicants who wrote about Union membership and the payment of dues in the six files (Exhs. 138-143). The jury was fully justified in its conclusion that, if the Trustees had been persons independent of UMW control, they would not have tolerated such unlawful use of the Welfare Fund by the UMW. This was one phase of this case in which the attitude of the Trustees greatly perplexed counsel for Phillips Brothers, and the jury must have also been disappointed in this attitude. The jury was fully justified in conclud-

ing that, had the Trustees been concerned with the welfare of the beneficiaries of the Fund, means would have been found, or at least discussed, of informing the pensioners that their Fund benefits would not be affected if they chose not to join the much publicized UMW activities which involved considerable amount of activity on the part of these elderly men in all sorts of inclement weather.

3. **The Trustees Have Used Lawsuits to Collect Welfare Fund Royalties From Small Coal Companies for the Purpose of Driving Them Out of Business.**

The jury reasonably concluded that the Trustees have used lawsuits, such as the case at bar, to collect Welfare Fund royalties from small coal companies for the purpose of driving them out of business pursuant to the terms of the conspiracy. In the struggle of the small companies of the area to stay in the TVA coal market, the Trustees stood by as the contracts came into being by the use of "spectacular violence" (a phrase used in **Flame Coal Company v. UMW**, 303 F. (2) 39; **White Oak Coal Company v. UMW**, 318 F. (2) 591), with pensioners under the Fund participating. When the struggle over the TVA market reached a crucial phase, the Trustees filed suits in rapid succession against the small operators for amounts sufficient to wipe out those companies (1615a-1616a).

a. The principal occupation of the Trustees appears to be the bringing of lawsuits such as this. The Trustees meet four to six times per year (1018a, 1055a), each meeting lasting from two to four hours (1019a, 1056a). The Trustees testified that up to fifty percent of their time in these meetings is devoted to considering the bringing of lawsuits for royalties (1019a, 1065a).

b. The fixed and unvarying policy of the Trustees is to collect the last cent of the royalty, regardless of the

condition of the small coal company or the effect which the driving of the company into receivership or bankruptcy will have upon the beneficiaries of the Welfare Fund who are employed by these small companies. Mr. Mitch testified that there can be no settlements; the Trustees will accept only the full amount due under the contract (1073a). Trustee Schmidt testified that the policy is to collect the very last cent (1065a). This policy is absolute; the fact that such a recovery means receivership or bankruptcy for the company and unemployment for the employee beneficiaries of that company, and the fact that the royalty amounts to more than the total profits of a company for its entire life, is not a subject for discussion by the Trustees (1065a). Trustee Roche went to great pains to show that the Trustees would permit no company to pay less than the last cent (1020a-1021a).

c. The Trustees have no concern for the employees of the small companies that are put into bankruptcy or receivership. Trustee Roche testified that the lawsuits are conducted to collect the last cent, regardless of anything about the company (1020a-1021a), and that no exceptions are made for any reason (1047a-1048a). Trustee Schmidt testified that the lawsuits are pressed even though it means that the employees who have mined the coal that paid the royalties theretofore are thrown out of the industry, thereby losing their beneficiary status under the Welfare Fund (1065a). As in the case at bar, the Trustees are not concerned with the circumstances under which the individual small company came to sign the contract. The jury was, therefore, justified in its conclusion that the Trustees were cooperating with the UMW in enforcing the Welfare royalty provisions of the contract as a prime instrument of the conspiracy to drive small operators out of the industry.

4. The Trustees Have Continued to Pass Resolutions Aimed at Keeping the Coal From Small Mines Off the Markets.

Since Trustee Schmidt has been on the Board of Trustees of the Welfare Fund, a resolution has been passed which bars from eligibility unemployed miners who get together and open up a small mine in order to gain a livelihood in areas where they have become unemployed because the company which formerly employed them has gone out of business and there is no other employment available to them. There are many hundreds of these little mines over the country, many of them in Tennessee (1064a). The jury was entitled to reach the conclusion that this is just another device to keep small-mine coal off the market. A recent resolution of the Trustees was to reduce to one year the time limit for the obtaining of hospital care under the Welfare Fund by miners who have been forced out of the industry and who are unemployed (1077a-1078a).

III. The Proof With Respect to the Contract Being Imposed Upon Phillips Brothers Pursuant to a Conspiracy to Restrain Trade and Monopolize.

We do not believe it necessary to repeat the statement of the kind of conspiracy that was alleged, the same having been quoted at the beginning of this statement of facts. There was proof to support every phase of this statement. Also, for the purposes of this appeal, it is sufficient, rather than detailing the proof on conspiracy, to point out that the jury found the conspiracy charged did exist and this included a central scheme to force the contract on Phillips Brothers and other small companies to rid the industry of their competition through the imposition of impossible costs. The Trial Court and Court of Appeals sustained the jury's finding but still held the contract was valid for at least a portion of the period of the case.

IV. The Circumstances Under Which the Employees of Phillips Brothers Joined the UMW.

The evidence in the record is uncontradicted that the employees of Phillips Brothers were compelled to join the UMW on April 25, 1955, as a result of a reign of terror instituted by the UMW during April, 1955, against Phillips Brothers and many other small coal operators in the East Tennessee coal fields.

H. B. Wicks, a UMW member of many years, including the year 1955, testified that he was notified to attend a meeting of UMW members in Jellico, to be held on April 5, 1955 (138a-139a). He testified that Ed Daniel and Taylor Maddox, organizers for District 19, UMW, and Albert Pass, Secretary-Treasurer of District 19, UMW, were among the speakers at that meeting (140a). Albert Pass told those UMW members in attendance at the meeting that they were going to have to stop the movement of coal out of Jellico and it made no difference what it took to stop it. Pass stated:

> "If any of you men get in any trouble stopping it, all you have to do to see me is look back. I'll be there" (140a).

Mr. Wicks testified that he was ordered to go in a caravan of automobiles roving across the countryside a day or two after the meeting in Jellico (140a-142a). After visiting a non-Union operation the caravan returned to Jellico where a mob of approximately 400 men marched through the stores and business houses in Jellico (143a). He identified the leaders of this mob as Tom Taylor and Dave Lowe (144a).

Mr. Jack Shattuck, a salesman for a company selling strip-mining equipment, testified about seeing a mob gathered in downtown Jellico on the morning of April

6, 1955 (119a). He stated that he went to the Boots and Cox Coal Company, a few miles out of Jellico (120a). While he was there a large mob came, and he saw them beat up Mr. Boots, one of the owners of the company (126a-127a). Mr. Shattuck was ordered by the mob to leave there, and he immediately tried to get to the Parrish and Frost Coal Company, a few miles away, to warn them that the mob was coming; however, the mob arrived there before he did and he went on to Phillips Brothers' tipple, a few miles farther down the road, to warn them that the mob was coming (128a).

Mr. Alonzo Cox, one of the owners of Boots and Cox Coal Company, testified about the mob of approximately 300 men coming to his operation on April 6, 1955, and beating both him and his partner (157a-158a). He could not reopen the mine until he signed the UMW contract (158a).

Mr. Andrew Frost, one of the owners of the Parrish and Frost Coal Company, testified about the mob coming to his operation on April 6, 1955 (133a). He identified the mob leader as Dave Lowe (133a). Both he and his employees were severely beaten on that occasion (133a-134a). He could not subsequently obtain employees for his operation and was forced to go out of business (134a-135a).

Mr. Will Hood Wender testified about being in downtown Jellico on the morning of April 6, 1955, and seeing a mob dump several truck loads of coal on the downtown streets of Jellico and abuse the truck drivers (149a-150a). The mob then got into automobiles and formed a caravan out to the Boots and Cox Coal Company operation where he saw them beat up Mr. Alonzo Cox (150a-151a). He saw Ed Daniel, UMW District 19 organizer, talking to these men (151a).

Mr. Raymond E. Phillips, one of the defendants-appellants, owners of Phillips Brothers, testified that, on April 6, 1955, after talking with Mr. Jack Shattuck and being warned that the mob was on its way toward Phillips Brothers' operation, he closed down his operation and sent his employees home or to otherwise seek safety (184a).

Mr. John VanHuss, owner of a deep mine near La-Follette, Tennessee, several miles from Jellico, testified that on the afternoon of April 11, 1955, a mob of approximately 100 men came to his mine and severely beat him and his employees (166a-167a). Mr. VanHuss identified Tom Taylor and Dave Lowe as being the leaders of the mob. He testified that Lowe stood over him with a pistol and said: "You wouldn't listen to Daniel * * * he was just one man" (167a). Mr. VanHuss prosecuted these two men, along with others, in the Criminal Court of Campbell County, Tennessee. Attorneys for the UMW and for the Trustees, defended these men who had been identified as the leaders of these mobs throughout the area (168a).

The evidence showed that, as Albert Pass had indicated in the beginning at the Union meeting in Jellico, the UMW was indeed ready to stand behind an of the men who got into trouble as a result of their mob activity. UMW District 19 paid the attorneys' fees for defending those men who were prosecuted by Mr. VanHuss (233a-235a), and this money paid by District 19 was obtained by ways of grants from the International UMW (249a-250a).

The mob visited the property of Phillips Brothers on April 11, 1955, the same day that they visited the mine of Mr. John VanHuss. The mob spokesman told Mr. Raymond Phillips to keep the mine shut down until he was

told he could open it up and he was told to have all of the employees join the UMW (186a-187a, 965a-966a). Subsequently, the partners went to Jellico, Tennessee, to see Mr. Ed Daniel, the UMW Organizer, and they were told they could not expect to run the mine when the men did not belong to the UMW. Mr. Daniel told the partners to go to the District 19 Headquarters at Middlesboro, Kentucky, and talk to the District Officers (187a-188a, 222a-223a). They went to Middlesboro, and talked to Albert Pass, Secretary-Treasurer of District 19, who was told about the visit of the mob to the tipple and that Mr. Daniel had told them to come to see him. Mr. Pass instructed the partners to have all their employees join the Union and then they could go back to work (188a, 224a).

The only proof in the record inconsistent with the foregoing in any respect is the testimony of Albert Pass, the Union officer. Mr. Pass admitted that the partners of Phillips Brothers came to see him on that occasion and his testimony regarding that meeting was substantially the same as the testimony of the Phillips Brothers partners except that Mr. Pass denied remembering any mention being made in the conversation about the mob violence (236a-237a, 241a). In the meeting between the Company and the Union arrangements were made to have an organizer come to the tipple to sign up the employees. On April 25, 1955, Mr. Daniel and Mr. Maddux, District 19 Organizers, came to the Phillips Brothers' tipple and signed up all of the employees, including two of the partners (188a, 224a, 237a, 842a, 973a-974a, 978a-979a, 982a). The Organizers advised that everybody had to join except one man who would be the boss, and that was Mr. Raymond E. Phillips (189a, 225a). The employees signed up as UMW members because they knew that this was the only way that the UMW would allow them to return to work (973a, 977a, 982a).

V. The Proof With Respect to the Enforcement of an Illegal Union Security Clause in the Contract.

We have set forth in the Appendix several of the clauses of the National Bituminous Coal Wage Agreement, including the clause which provides that the UMW shall be the exclusive representative of the employees and the clause that the contract is an integrated instrument and also the Union Security Clause. This latter clause provided before the 1950 contract that as a condition of employment the employees would be required to become members of the UMW. In 1950 there was added the clause at the end "to the extent and in the manner permitted by law."

The major coal companies vigorously assailed this clause before 1950 and it was held illegal (271a, 272a, 302a-303a, 305a-307a, 309a). After 1950 there has been no challenge of this clause, with the amendatory language, by the major coal companies (326a, 328a-329a), although it has been the subject matter of some cases such as this brought by the Trustees against small coal companies and of cases brought by Progressive Mine Workers against UMW (1493a-1495a).

We have set forth in the Appendix the Federal statutory language which we believe bears upon the validity of such clauses. In 1951 the Labor Statute (29 U. S. C. A., Sec. 158) was amended to provide that such clauses did not require the prior vote of employees, but the restriction was added that the Union shop or Union Security Clause was not permissible unless the Union had complied during the preceding twelve months with the reporting provisions of the statute, which called for the filing, on a voluntary basis, of reports of finances and organization with the Secretary of Labor and of non-communist affidavits with the National Labor Relations Board. This was the state of the law throughout the period of this case. At no time during this period did UMW comply with these reporting provisions

(337a-338a). Its refusal to comply was a matter of wide public knowledge as was stipulated in the record (337a-338a).

That the Union Security or Union Shop clause was enforced in this case, that the employees of Phillips Brothers were required to join the Union, and the circumstances under which this requirement was imposed, is discussed above in Part IV of this statement of facts, and, without repetition we refer to that discussion. We point out that when the partners went to the UMW District Office at Middlesboro, the UMW Officer, Albert Pass, testified: "And, of course, I asked him if the company had signed a contract and he said yes. I said, well, have they ever signed check-off cards, and he said no. I said, well the first thing will have to be done, we will have to get a field worker over there to sign those men up——" (237a). The company and the field representatives then arranged the meeting and had the men sign up.

ARGUMENT.

I. Was There Substantial Evidence to Support the Jury Verdict That the Trustees Participated in the Conspiracy Alleged by Phillips Brothers?

After the jury verdict the Trustees, Plaintiffs below and Respondents in this court, filed motion for judgment notwithstanding the verdict. The Trial Court granted this motion and this action was sustained by the Court of Appeals. The basis of the Trial Court's ruling with respect to the judgment notwithstanding the verdict was the Court's opinion that on the issue presented in the first jury form there was insufficient evidence to show that the majority of the Trustees were involved in the conspiracy. The Court of Appeals concurred.

We submit that the Trial Court's Opinion evidences an entirely too restrictive interpretation of the theory of conspiracy stated by the defendants and cross-plaintiffs and the opinion manifests the concept that the Trustees could be involved in the conspiracy only by proof of direct negotiations between the Trustees and the major coal company representatives wherein the Trustees' part in the conspiratorial matter was arranged. This concept is to be contrasted with the portion of the Court's charge which states: "Conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done" (159a); **Eastern Retail and Lumber Dealers Assoc. v. United States**, 234 U. S. 600. Under the Court's concept, the plainly stated theory that the Trustees were "stooges" or pawns, subject to the UMW's domination and the great amount of evidence upon that subject were not mentioned and found no place in the Court's Opinion.

We believe that on the record it was reasonable for the jury to find that the UMW has dominated the Trus-

tees to the extent of using them as pawns or as willing tools to carry out the purposes of the conspiracy. Under part II of the statement of facts above we have set out portions of the proof that bear upon this question. The UMW's effort to control this Welfare Fund has been a matter of history. This very effort by this very Union was responsible for the passage of those provisions of the Taft-Hartley Act and the previously vetoed Case Bill which regulated Welfare Funds found in labor contracts. **United States v. Ryan**, 350 U. S. 299, 304-305, 100 L. Ed., 335, 341; 76 S. Ct. 400. We dare say that this effort by this Union caused Congress to enact 29 U. S. C. A., Sec. 186 (c) (5) (B) requiring the contract itself to set forth the detailed basis for payments from the Fund. The record in this case shows the struggle for control over this Welfare Fund by the Union before 1950, and the termination of this struggle in 1950, when the representatives of the major coal companies made the *quid pro quo* and by their own words put the responsibility for the Welfare Fund directly upon the Union. The record discloses the means by which the Union sought to maintain its control over the Welfare Fund before 1950 and the continuation of those same practices after 1950. The record discloses the extent to which the control over the Welfare Fund benefits has been of assistance to the Union in carrying out its conspiratorial purposes. The discussions of economic stabilization in the industry between the Union and the major coal company representatives and a disposition of those economic matters at the same time that the major coal companies put the responsibility of the Trust Fund on the Union can be explained only by the kind of conspiracy which was alleged and which was found by the jury.

We do not share the view, which likely gave the Courts below concern, that the upsetting of the contract between the Trustees and Phillips Brothers Coal Company would

upset hundreds of other contracts and interfere with the benefits being received by thousands of beneficiaries under the Fund. We do not say that the Courts expressed this concern but it would certainly be natural for a court to consider the effect of its decision in this case on the rights of many needy and deserving coal miners. The only contract challenged in this case is the contract which Phillips Brothers Coal Company signed. The only party who could assert invalidity of contract under this kind of conspiracy would be a party who could prove in a case such as this that he was an intended victim of the conspiracy and that the enforcement of his contract would be to enforce the conspiracy. The decision in this case can be given no broader interpretation. A mistaken concern for broader repercussions than the issues of the case warrant should certainly not be a reason for depriving these parties of their remedies and defenses to which they are entitled under the ordinary rules of law.

We conceive that the only broader repercussions will be salutary. The enforcement of the jury verdict might just prod these Trustees into considering the viewpoint of those retired miners who have been trudging through rain and snow, hot and freezing weather on Union errands, required to pay their Union dues, knowing that the Trustees headed by their Union leader may take away their hard earned pensions for any reason they may choose.

There also needs to be considered those men who are being forced out of the industry, and their families.

In the course of this conspiracy the number of employed coal miners has declined from 433,698 in 1949 (Ex. 156A) to 160,200 (1217a). Even the Director of the Welfare Fund acknowledges that the outstanding Welfare problem in the industry is the devastating and increasing unemployment (1045a) as to which the Fund has nothing to offer except words of advice to Federal authorities (1047a).

II. After the Jury Has Found That United Mine Workers of America Engaged in a Conspiracy With Major Coal Producers, a Part of Which Conspiracy Involved the Imposition of Onerous Contractual Obligations Upon Small and Thin-Seamed Mines, Such as That of Petitioners, to Drive Such Companies Out of the Industry, Such Jury Verdict Being Sustained by the District Court and the Court of Appeals, Are Such Onerous Contractual Obligations Enforceable?

The jury has found under the second jury form formulated by the Court and presented to the jury that the UMW did engage in the kind of conspiracy charged and that a central part of this conspiracy was the imposition on the small coal companies of contract obligations which they could not possibly pay. The Courts below sustained the jury verdict in this respect. It is our position that such a contract pursuant to such a conspiracy should not be enforced by the Court.

We recognize that every contract made in the carrying out of a conspiracy in restraint of trade is not invalid. The annotation in 3 L. Ed. 2d 1798, shows the distinction which must be made in determining the validity of such a contract. "Where the Court would itself be enforcing the precise conduct made unlawful by such law," the anti-trust laws deny enforcement of the contract. It is in these kind of cases that the violation of the Sherman and Clayton Acts affords a defense to suit based on contract.

Where the conspiracy involves the imposition of heavy costs upon the victim to run the victim out of business, the logical and reasonable solution is not to enforce the contract that imposes these heavy costs and thus create a triple damage claim under the anti-trust law where none may have existed before the enforcement of the contract, but rather to deny the enforcement of the contract. By

enforcing the contract the Court would be creating the damage which the law was designed to prevent.

The cases where contracts have been enforced regardless of proof of conspiracy are distinguishable from this case. The defendants in those cases were getting the benefit of something which they would not have without the contract. That is not true here, as is shown in the Statement of Facts, Section IV above. The men wanted to work regardless of Union affiliation or Union contract and the mob scenes merely constituted a rude interruption in their occupation.

Here, again, our contention is not an attack upon the trust fund as a whole but is a defense to a claim in a case where the defendant can prove that it is an intended victim of a conspiracy in which the contract was an instrument used against the defendant.

III. **Where a Union Gains a Majority Representative Status in a Collective Bargaining Unit of Employees by Means of Mobs and Violence Compelling the Employees to Join the Union, Is the Collective Bargaining Agreement Signed by That Union and the Employer Valid and Enforceable in a Suit Under 29 U. S. C. A., Section 185?**

The Answer (18a) of Petitioners alleged that the employees of Phillips Brothers did not belong to the Union when the Contract was signed and did not become members until forced to join by coercion, intimidation and fear under acts violating 29 U. S. C. A., Section 158 (b).

We have set forth above in Part IV of the Statement of Facts, the proof with respect to the circumstances under which the employees of Phillips Brothers Coal Company joined the UMW. There is no contrary evidence with respect to this proof except by the witness Albert Pass,

Secretary and Treasurer of District 19 of the United Mine Workers of America as to the part he played in the violence which was going on and with respect to the exact statements that were made in the conversation between Phillips Brothers and himself when it was arranged to have a meeting of the employees to have them join the Union. It is certainly not contradicted in the record that considerable mob violence and terrorism pervaded the coal fields at the time Phillips Brothers and the Union officers arranged the meeting at which the employees signed up.

As shown in the statement of facts, after one of the mobs visited the Phillips Brothers' place of operation and closed the operation down, the partners of Phillips Brothers went to Jellico, Tennessee, to see Mr. Ed Daniel, the UMW Organizer, who was referred to in the other testimony with respect to the mobs, and Mr. Daniel told them that they could not expect to run the mine when the men did not belong to the UMW. Mr. Daniel did not testify in this case and there is no denial of this testimony of the Partners. The Partners went to Middlesboro and talked to Mr. Albert Pass, the District Officer, and the Partners testified that they inquired as to the purpose of the visit of the mob to the tipple and advised Mr. Pass of the conversation with Mr. Daniel, and Mr. Pass advised them to have all of their employees join the Union and then they could go back to work. Mr. Pass admitted in his testimony that the Partners did come to see him on that occasion and the only difference in his testimony in this respect is that he did not remember that there was any mention about the mobs. In any event, there was an arrangement made to have the District Organizers come to the tipple and sign up the employees. The employees did come and sign up in a group with the Partners and the District Organizers present and the employees' testimony is that they signed because they knew they had to in order to go back to work.

While Paragraph 8 of the Answer raised the defense pertaining to this question (18a), the Court of Appeals, in its Opinion stated:

> "We doubt that these issues are before us on this appeal. They were not submitted to the jury and no facts were found by the jury with respect thereto. On the contrary, the District Judge instructed the jury:
>
> " 'The sole question for you to decide in the suit of the Trustees is whether the plaintiff Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged by Phillips Brothers.'
>
> "Twice thereafter in his charge, the District Judge repeated the substance of this instruction to the jury. Following the instructions and a consideration of the UMW's objections to the charge, counsel for Phillips stated to the Court:
>
> " 'If your Honor please, the defendants and cross-plaintiffs have no exceptions to the charge and no requests for additional charges.' "

But the Trial Court further charged the jury that the Court was to decide the question of contract liability after the jury verdict. The charge was:

> "With regard to the welfare provision for the payment of 40 cents per ton royalty, the claim of the Trustees against Phillips Brothers Coal Company will be finally decided by the Court after the verdict of the jury. But the jury must decide the issue of whether the Trustees participated in the conspiracy alleged."

The validity of a contract is usually a question to be decided by the Court as a question of law, and not by the jury. **53 Am. Jur. 218, Trial, Sec. 256.**

The facts on this question were not in material dispute. Furthermore, the jury actually found the facts to be as stated above.

The statement made in the pre-trial order with respect to the theory of conspiracy and the theory which was charged to the jury by the Court, included the following language: "And with the use of mobs and in an atmosphere of coercion directed against the Company and its employees, the Union Shop Clause of the contract was enforced by the Union and the employees were required to join the Union in order to go back to work; they were not given benefit cards under the Welfare Fund until they did join the Union; it was only under these circumstances that the UMW received any authority or right to act as bargaining representative of the employees of Phillips Brothers."

The jury found that this kind of conspiracy did exist and the Courts below sustained this finding against UMW.

We believe that the fundamental sections of the Labor Law are 29 U. S. C. A., Sec. 157, and 29 U. S. C. A., Sec. 158. These sections are carefully designed to preserve the rights of employees to self-determination on the questions of joining a Union or refraining from joining a Union and in the selection of bargaining agents, free from coercion or interference by Union or employer.

In **Garment Workers Union v. NLRB** (June 5, 1961), 366 U. S. 731, an employer extended, and a Union accepted, recognition as exclusive collective bargaining representative of the employees without checking to ascertain the fact that in actuality the Union represented only a minority of such employees, and at that time a tentative contract was signed between the employer and the Union. Subsequently, the employer and the Union entered into a formal collective bargaining agreement at which

time the Union did represent a majority of the employees in question. The Supreme Court held that both the tentative contract and the subsequent formal contract were invalid. The Court said:

> "In their selection of a bargaining representative, section 9(a) of the Wagner Act guarantees employees freedom of choice and majority rule—(the employer) granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the non-consenting majority. There could be no clearer abridgement of section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing,' or 'to refrain from such activity.'"

It made no difference that the Union and the employer had a bona fide belief that the Union represented the majority of the employees. It made no difference that a permanent contract was subsequently executed after the making of the temporary contract and at the time of the making of the later permanent contract the Union actually represented a majority of the employees.

The decision was a five-to-two decision and even the two dissenting Justices recognized that the contract was invalid with respect to the non-Union members. The minority opinion stated:

> "I think the Court is correct insofar as it set aside the exclusive recognition clause in the contract. I think it is incorrect in setting aside the entire contract. First, that agreement secured valuable benefits for the Union's members regarding wages and hours, work standards and distribution, discharge and discipline, holidays, vacation, **health and welfare funds,** and other matters. Since there was no duly elected representative for all of the employees authorized in accordance with the Act, it certainly was the right

of the employee-Union members to designate the Union or any other appropriate person to make this contract they desired" (Emphasis added).

However, the majority held the contract invalid as to Union members as well as to the non-Union members.

With respect to the fact that at the time of the execution of the subsequent formal agreement, the Union actually had a majority of the employees, the Court said:

> "At the outset we reject as without relevance to our decision the fact that, as of the execution date of the formal agreement on October 10, Petitioner represented a majority of the employees. As the Court of Appeals indicated, the recognition of the minority Union on August 30, 1957, was 'a fait accompli depriving the majority of the employees of their guaranteed right to choose their own representative.' It is, therefore, of no consequence that petitioner may have acquired by October 10 the necessary majority if, during the interim, it was actually unlawfully. Indeed such acquisition of majority status itself might indicate that the recognition secured by the August 30 agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support."

In the case at bar the Trial Court applied the rule in **Garment Workers v. NLRB**, supra, to the extent of eliminating that portion of the claim of the Trustees which covered the period before the employees joined the Union. But, in spite of the condition of the record with repect to how the employees came to join the Union, the Court enforced the contract for the period after the employees were coerced into joining the Union.

The sections of the Labor Law referred to above clearly manifest the intent that the employees will not be encour-

aged or coerced by the employer to join the Union or coerced by a Union to join. We submit that in this case we have the clearest kind of coercion.

We submit that the enforcement of contracts secured in this manner only makes a farce of the Labor Laws, the very fundamentals of which were designed to eliminate this kind of coercive tactics. The violence which has pervaded the coal fields and which has been for the purpose of obtaining contracts inimical to the interests of employees and Union power over employees will only be encouraged by such enforcement.

But the Court of Appeals sustained the Trial Court on this question. With reference to **International Ladies' Garment Workers Union v. NLRB**, supra, the Court of Appeals said:

> "The Court did not have before it the question of the validity of the contract in a common-law action to enforce it. The issue which it was passing upon was whether the execution of the contract constituted an unfair labor practice, and, if so, what was the proper remedy. The remedy was to direct the parties to cease and desist from operating under it. Because of the unfair labor practices the agreement **failed** to be binding on the parties. The same might be true of the bargaining agreement in this case if this was a proceeding before the Labor Board involving an alleged unfair labor practice. But it is not that kind of a proceeding, over which the Labor Board has exclusive jurisdiction. **Portland Web Pressmen's Union v. Oregonian Publishing Co.**, 286 F. (2) 4, C. A. 9th, cert. denied 366 U. S. 912. Neither the District Court nor this Court has jurisdiction to find either of the parties to the bargaining agreement guilty of an unfair labor practice, and no such finding has been made. In the absence of such a proceeding and finding we are of the opinion that

> the ruling in **International Ladies' Garment Workers' Union v. NLRB**, supra, 366 U. S. 731, is not applicable."

We do not believe this was "a common law action" to enforce the contract, as stated by the Court of Appeals, but a suit under 29 U. S. C. A., Section 185 (Section 301 of the Act). Also, we submit that in such a suit a defense of improperly coerced representative status, contrary to the Federal Labor Policy expressed in the statutes, and the invalidity of a contract arising therefrom may properly be raised and entertained by the Court under **Textile Workers Union v. Lincoln Mills**, 353 U. S. 448; **Charles Dowd Box Co. v. Courtney**, 368 U. S. 502; and **Smith v. Evening News Assoc.**, 371 U. S. 195. The last case cited was decided after the briefing and argument of this case in the Court of Appeals. It would appear to be decisive on this question.

It can be said, as in **Smith v. Evening News Assoc.**, supra:

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301."

It seems equally reasonable to say that the authority of the Board to deal with an unfair labor practice which also constitutes a defense to a suit on a collective bargaining agreement is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts to decide the issue raised by the defense in a Section 301 case.

We refer to the broad meaning intended to be conveyed by Section 301 by the Congress as reflected in the House discussion quoted in **Textile Workers Union v. Lincoln**

Mills, 353 U. S., 448, at 455-456. It was to include such suits as proceedings by interested parties "under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract". The law to be applied was Federal substantive law derived from the Federal Labor Policy, particularly that found in the labor statutes. If the statute condemns coerced representative status, that policy should be applied when raised as a defense in a Section 301 case.

Even the minority opinion in Lincoln Mills, at pages 482-483, recognized that in a Section 301 case the validity of the contract could be challenged on the ground that claimed representation did not comply with the statute.

If it is correct to say that the Federal Labor Policy is that a contract is invalid and not to be enforced in a Board case because of no majority representation or because of coerced representative status, as in **International Ladies Garment Workers**, supra, then it would seem the same result would be reached in a Section 301 case based on the same contract. Otherwise, Federal Labor Policy is unevenly and inconsistently applied.

IV. **Where the Employees of Petitioners Joined the United Mine Workers of America in an Atmosphere of Coercion by Mob Violence and Pursuant to Arrangements Made Between Petitioners and the Union and Where the Union Had Not Performed the Statutory Requirements Necessary to Be Performed Before a Valid Union Security Clause Could Be Inserted in the Labor Contract Already Existing Between Petitioners and the Union, Is the Contract Enforceable Even Though It Is an Integrated Contract and Contains a Union Security Clause?**

This question may be surplusage in view of Question III above. It relates to the Union Security Clause in the

contract between Phillips Brothers and UMW. It is to be distinguished from Question III above in that Question III is founded on the rule in **Garment Workers Union v. NLRB**, supra, which rule has to do with coerced Union membership irrespective of a Union Security Clause in a contract. However, there have been a number of decisions on this contract clause without specific discussion of the question raised here.

This defense was specifically raised in the Answer (17a) and the fact of non-compliance with 29 U. S. C. A., Sec. 159 (f) (g) and (h) was stipulated (337a-338a). Before the 1959 amendment, Section 158 (a) (3) of Title 29 required compliance with those sections "within the preceding twelve months" before a Union security clause be inserted in a contract.

The Court of Appeals overruled this defense on the authority of **NLRB v. Rockaway News Supply Co.**, 345 U. S., 71, and **Lewis v. Benedict Coal Corporation**, 361 U. S., 459, 468-470.

But **Rockaway News Supply**, at page 78, points out that the contract involved there contained savings and separability clauses, quite the contrary to the "integrated contract" clause in the contract involved here. Furthermore, the requirement of the statute that failed to find mention in the Rockaway Union Security Clause did not have reference to the doing of something that was a condition precedent to the permissible insertion of the clause in the contract. The opposite is true here. Then, in Rockaway the Court found "the whole contract shows respect for the law and not defiance of it."

Aside from defiance of the statute with respect to how representative status and authority to contract may be attained, UMW was disdainful of the very statutory reporting and filing provisions which were flouted when

the Union Security Clause was inserted in the contract. John L. Lewis, President of UMW., told the delegates to the 1952 Convention of the Union:

"It is unfortunate indeed that the convention of American Federation of Labor in San Francisco, shortly after this statute was enacted, did not accept the advice of the United Mine Workers given to them at that time and withdraw from any association with this Act and refuse to sign the anti-communist oath. If labor had just enough brains in its leaders, just a small amount of brains at that, the Taft-Hartley Act would have fallen by default and would have been long since repealed by a Congress that would have recognized its futility to bind free men in chains at the behest of the National Association of Manufacturers, operating through its supine tool, Robert Alphonso Taft.

" 'Even now, if the leaders of the American Federation of Labor and the leaders of the CIO had had the courage of a long-eared jack rabbit looking at a red bone hound they would withdraw their anti-communist oaths and let this damnable statute fall now by default.

" 'But I don't know how to pump any courage into the veins of these syncophants who are willing to sell out the destiny of the labor movement and the future of its millions of members and their wives and families in this country for a lousy lunch or a pat on the back from some pseudo-politician in Washington. The day will come, if this Act continues to prevail, when the rank and file of organized labor will repudiate a leadership born in weakness and conducted upon the premise that they must consistently act respectable and in a manner that brings a smile and the compliments of the politicians of the country who are servants of the economic master of the country.' "

The reference made by the Court of Appeals to pages 468-470 of Benedict, supra, is not understood. On those pages the Court dealt only with the question of set-off against the Trustees' claim of contract damage claims against the Union, and the effect of National Labor Policy on that question. Set-off is not involved here and the question presented is whether the policy expressed in the statute (29 U. S. C. A., Sections 158 and 159) will be applied under this situation. The validity of the contract was not challenged in Benedict but the contract was relied on by both sides.

There can be no doubt that this Union Security Clause was in effect and was intended to be enforced except in "right to work" states. The arguments made in, and conclusions reached by, a number of trial courts make this clear.

In **Lewis v. Pentress Coal and Coke Co.** (1958), 160 Fed. Supp. 221, 224, 225, the District Court said:

> "'. . . the Court is of the opinion that it was the intention of the parties that the requirement for Union membership of employees should not be operative in states having right-to-work statutes.'
>
> "'It would have practically the same effect as if the parties had provided in express terms that the provision for Union membership as a condition of employment should not apply in any state where such provision was unlawful. Any other conclusion would do violence to the clearly expressed intention of the parties.'

In **Lewis v. Hixon** (1959), 174 Fed. Supp. 241, the Court said:

> "'. . . the saving clause, in requiring Union membership only in the **manner** permitted by law must mean, if anything, that where freedom-to-work stat-

utes are applicable, the Union Security Clause is not to be given effect' " (Emphasis by the Court).

In **Lewis v. Kerns** (1959), 175 Fed. Supp. 115, the Court said:

" 'In any event the savings clause clearly provides that the Union security provision is without force and effect in those jurisdictions where Union security is prohibited by law.' "

And in **Lewis v. Mill Ridge Coals, Inc.** (1960), 188 F. Supp. 4, the District Court said with respect to the Union Security Clause:

" 'If defendant complied with this agreement all of its employees except exempted classifications, which are generally speaking supervisory personnel not covered in any manner by the contract, were members of the Union and were thus all entitled to benefits of the Welfare and Retirement Fund. Under the National Labor Relations Act, 29 U. S. C. A., Sec. 158 (a) (3), such a closed shop agreement is legal and it does not violate any law of Kentucky. Therefore, the allegation that the plaintiff trustees and the Union are committing an unfair labor practice by providing benefits of the Welfare and Retirement Fund to only such of defendant's employees as are members of the Union appears to be a spurious defense.' "

If eminent judges, guided by learned counsel, can so construe this contract, what is the coal miner to believe about this requirement of Union membership? After all, the overall statutory restriction is against any term of employment which would encourage his joining a Union (29 U. S. C. A., Sec. 158).

CONCLUSION.

It is submitted that there are some troublesome provisions in this labor contract that are extremely difficult to reconcile with the clear expressions of the statutes. In the case of a national contract, such as this, it would be natural to expect the major employers of the industry to iron out these troublesome spots with the Union, adopting appropriate language to make conformance with the statute beyond question. The reason this has not been done in this industry, and the reason the challenges have come in scattered cases involving small employers can very logically be attributed to the conspiracy found by the jury whose verdict against the Union was sustained by the Trial Court and Court of Appeals.

The questions presented here affect particularly the thin-seam fields of the Appalachians that defy mechanization, but which have scores of communities that have been entirely dependent upon coal production for decades. Perhaps the futuristic image of the industry, with huge machines operated in the rich seams by a handful of highly skilled men, being paid fabulous wages and Welfare benefits, is attractive enough to make it desirable that everyone else in the industry give way and get out. But these are living human beings with families to support and nowhere else to turn to make a living. The labor statutes were not designed or intended to assist in ushering whole masses of people into unemployment.

Phillips Brothers, having gone beyond its means in conducting this case to this stage and having won a judgment below against the Union, reluctantly seek one more round in this struggle. Petitioners are not being greedy by seeking to reverse the Trustees' judgment against them. Petitioners understand the impact that the questions in-

volved here have on a multitude of other people, many of whom are already embroiled in suits by the Trustees and will be unable to fight back.

For the foregoing reasons Petitioners pray that this Honorable Court grant the Writ of Certiorari on the stated questions under the decision and judgment of the Court of Appeals for the Sixth Circuit entered on December 18, 1963.

Respectfully submitted,

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OPINION OF COURT OF APPEALS.

(Filed Dec. 18, 1963, Carl W. Reuss, Clerk.)

Nos. 14809-10.

United States Court of Appeals
For the Sixth Circuit.

No. 14809.

James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Admrx. of the Estate of Burse Phillips, Deceased,
Cross-Plaintiffs-Appellees,

v.

United Mine Workers of America,
Cross-Defendant-Appellant.

No. 14810.

John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs-Appellees,

v.

James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Admrx. of the Estate of Burse Phillips, Deceased,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided December 18, 1963.

Before: Cecil, Chief Judge, Miller, Circuit Judge, and Freeman, District Judge.

Miller, Circuit Judge. This is an action by John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, hereinafter referred to as Trustees, against the defendants, James M. Pennington, Raymond E. Phillips, and Burse Phillips, individually and trading as Phillips Brothers Coal Company, a partnership, hereinafter referred to as Phillips. The Trustees seek to recover $55,982.62 as royalty payments alleged to be due and unpaid pursuant to the terms of a trust provision contained in a wage agreement between United Mine Workers of America, hereinafter referred to as UMW or the Union, and Phillips. Following the death of the defendant Burse Phillips, Lillian Goad Phillips, Administratrix of his estate, was substituted as a party defendant.

The complaint alleges that on or about October 1, 1953, Phillips and the Union entered into the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, hereinafter referred to as the Wage Agreement, and at specified dates thereafter entered into said Wage Agreement, as amended September 1, 1955, and as amended October 1, 1956, and that pursuant to the terms of said Wage Agreement, as amended, Phillips was required to pay into the Welfare Fund the sum of 40 cents per ton on each ton of coal produced for use or sale. The parties have stipulated the amount of tonnage of coal so produced during the period of October 1, 1953, through December 31, 1958, which was subject to the 40 cents per ton royalty, that Phillips made royalty payments thereon pursuant to the Wage Agreements in the total amount of $2,227.70, and that the amount of royalty which was not paid on said total production was $55,982.62, being the amount sued for.

There is no contention by the defendants that the Wage Agreements were not executed by the partnership, but it

is contended by them that they were invalid and that no liability exists for the unpaid royalties.

The answer alleges that the agreements were entered into by Phillips by reason of duress on the part of UMW, which conducted a program of terrorism in the section in which Phillips' mine was located, with the result that the agreements were unwillingly executed because Phillips knew that they would not be permitted to operate their coal mine unless said agreements were signed.

The answer further alleges that UMW and certain large producers of coal entered into a conspiracy, the purpose of which was to place financial burdens upon Phillips and other small operators similarly situated that could not possibly be paid out of funds realized from the operation of the mine, and such mines, thus being unable to meet the demands, would be closed down, either through violence or suits such as the present one, leaving the business of shipping coal in interstate commerce and to the government agencies to the large coal operators; that UMW and the large coal companies conspired to increase such financial burdens by increasing the wage scale, both by modifications of the Wage Agreement and by having the Walsh-Healey Act apply to the coal industry and have the minimum wage determined thereunder; and that such conspiracy and the acts thereunder were in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, Sections 1 and 2, Title 15, United States Code.

Section 1 of the Sherman Act provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; . . ."

Section 2 of the Act provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine. . . ."

The same alleged conspiracy is the basis of a cross claim against UMW, in which the large coal producing companies were not made cross defendants, which also alleged that during the time the Wage Agreements were in effect and for the purpose of fulfilling the conspiracy, UMW forcibly closed down Phillips' mining operation and forcibly kept the mine closed over a period of time, which was accomplished by the presence of armed mobs comprised of members or agents of UMW, which intermittently marched through the countryside, closing numerous mines on their forays and creating a reign of terror.

The cross claim alleges that by reason of the conspiracy and the enforced closing down of the mine, Phillips was damaged in the amount of $100,000.00, which should be tripled under the provisions of Section 4 of the Clayton Act, Section 15, Title 15, United States Code.

By an amended answer and cross claim Phillips alleges that in contrast to the disputes which existed between the large coal-producing companies of the country and UMW during the period of World War II and the postwar period, there has been no dispute of any consequence between these parties since 1950, that the alleged conspiracy commenced in 1950, and that it has been implemented by additional understandings between the parties to make more effective the activities in restraint of trade. It specifically alleges that the Union agreed to the termination of employment for thousands of its members because of the mechanization of mines, that it would not protest the closing down of mines which could not be mechanized and that it would go along with the understanding that the coal industry would

be confined to a comparatively few companies and the miners employed would be reduced drastically; that as a consequence of this understanding, membership of the United Mine Workers has decreased from 500,000 to 150,000; that the Union agreed that it would not make special agreements with the small operators in the Kentucky and Tennessee region, which would give consideration to local conditions and the particular coal seams mined by the operators, but would have a standard agreement for all operators; that the Union agreed that in the planned mechanization program it would aid in the financing which would become necessary to attain the mechanization of the mines of the large companies; that the large coal-producing companies agreed with the Union that they would not protest the demands of the Union with respect to wage increases so long as the companies were able to match those increases by increased productivity through mechanization; that the companies agreed that there would be no protests from them over the Union's use of the Welfare Fund for its own purposes and in furtherance of its organizing efforts; that under the 1958 Wage Agreement it was required that all signatory operators refrain from buying or marketing nonunion coal; and that the Union and the large companies agreed that they would do all things possible to restrain the production, marketing and sale of nonunion coal.

By another amended cross claim Phillips claims damages for the period commencing four years prior to the filing of the original cross claim on February 14, 1958, the period of damage to end December 31, 1958, at which time the cross plaintiffs ceased to do business, as limited by the four-year limitation provided by Section 15b, Title 15, United States Code.

UMW moved to dismiss the cross claim on the ground that it stated no cause of action, that in so far as it alleged

an unfair labor practice on the part of the Union under the provisions of Section 158 (b), Title 29, United States Code, exclusive jurisdiction thereof was vested in the National Labor Relations Board, and that it stated no cause of action under the Sherman Anti-Trust Act or under Section 301 of the Taft-Hartley Act, Section 185, Title 29, United States Code. The motion was overruled, except in so far as it challenged the jurisdiction of the District Court over any alleged unfair labor practice under Section 158 (b), Title 29, United States Code, which ground of the motion was upheld by the Court.

Thereafter, UMW filed its answer in which it denies that it joined in any conspiracy in restraint of trade or commerce in violation of the Sherman Act, or that it monopolized or attempted to monopolize or conspire with any other person or group of persons to monopolize any part of the trade or commerce among the several states. Affirmatively, it alleges that by virtue of Section 6 of the Clayton Act, Section 17, Title 15, United States Code, it is exempt from the provisions of Sections 1 and 2 of the Sherman Act. It contends that it is a labor organization within the meaning of Section 6 of the Clayton Act and it acted as such for its members in the negotiations for the execution of the Wage Agreements and that during the period of time involved herein its acts were motivated by legitimate labor goals and for the purpose of securing union standards of wages and better conditions of employment for its members, thus qualifying for the exemption provided by the Act.

The Claim of the Trustees against Phillips and Phillips' cross claim against the Union were consolidated for trial by jury. Following a trial of some four and one-half weeks the case was submitted to the jury.

As an aid to the jury in reaching its verdict, the Court prepared two verdict forms for the jury to answer.

Form No. 1 contained one paragraph reading as follows:

> "Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states as alleged by the original defendant, Phillips Brothers Coal Company."

The jury answered this question yes.

Form No. 2 contained three paragraphs. The first paragraph read as follows:

> "Did the cross defendant, UMW, engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross plaintiffs, Phillips Brothers' Coal Company."

The jury answered this question yes. The jury was instructed that if its answer to this first question was no, the remaining two questions need not be answered, but that if its answer to this first question was yes, it should answer the remaining two questions.

The second question read as follows:

> "If your answer to question 1 is yes, was cross plaintiff, Phillips Brothers' Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy."

The jury was instructed that if its answer to this second question was no, it need not answer question 3. The jury answered the second question yes.

The third question for the jury to answer read as follows:

> "We find in favor of cross plaintiff, Phillips Brother's Coal Company, and fix its damages in the amount of ———— dollars."

The jury in answering this question fixed the damages in the amount of $90,000.00.

At the close of the evidence for Phillips, the Trustees and the Union moved for directed verdicts in their favor, which motions were overruled. At the close of all the evidence, the Trustees and the Union moved for judgments in their favor notwithstanding the verdict and, in the alternative that the verdict be set aside and that a new trial be granted.

The District Judge ruled that there was no material or substantial evidence to support the finding of the jury that the Trustees of the Welfare Fund, as distinguished from the Union, engaged in a combination or conspiracy to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states and ordered that the verdict of the jury in so finding be set aside. However, in entering judgment for the Trustees, he reduced the amount of the recovery from $55,982.62 to $43,424.22, ruling that the Trustees were entitled to royalties only for the period from and after April 25, 1955, to and including December 31, 1958, and in that the employees of Phillips were not members of the Union until April 25, 1955. The Trustees have not appealed from this judgment, which eliminated the earlier part of their claim. Phillips has appealed from the judgment against it, which is appeal No. 14810, being one of the two appeals being herein considered.

The District Judge overruled the motion of the Union for judgment notwithstanding the verdict and, in the alternative, for a new trial, and entered judgment for Phillips against the Union in the amount of $270,000.00, being three times the amount of damages awarded by the jury, and also included in the judgment the additional sum of $55,000.00 as a reasonable amount of attorneys' fees to be awarded and assessed in accordance with the

applicable statutes, thus making a total award in the favor of Phillips in the amount of $325,000.00. The Union has taken an appeal from this judgment, which is No. 14809, being the other of the two appeals herein being considered. The two appeals have been heard together on a joint appendix.

We consider first appeal No. 14809 taken by UMW from the judgment against it in favor of Phillips.

The first question presented is whether a labor organization is exempt from the provisions of the anti-trust laws under Section 6 of the Clayton Act, Section 17, Title 15, United States Code. It provides as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

Although some question about this may have existed prior to 1945, the Supreme Court held in that year that although an exemption exists in cases where a labor union acts alone in furtherance of its own purposes, it does not exist in cases where a labor union combines with a nonlabor organization to restrain competition in, or to monopolize the marketing of, goods in interstate commerce. **Allen Bradley Co. v. Local Union No. 3, etc.**, 325 U. S. 797. See also: **United Brotherhood of Carpenters, etc. v. United States**, 330 U. S. 395, 400; **Los Angeles**

Meat & Provision Drivers Union v. United States, 371 U. S. 94, 99-101. The District Judge was not in error in refusing to dismiss the cross claim or to direct a verdict for the Union on this ground, and in submitting to the jury under a proper instruction the question whether the Union acted alone in carrying out the legitimate objects of labor unions, or aided, cooperated, conspired or combined with business groups in order to accomplish purposes which the anti-trust laws prohibit.

There is evidence to the effect that UMW forcibly closed down Phillips' mine by the presence of armed mobs which intermittently marched through the countryside. Reference is made to recent decisions of this Court holding that under certain conditions damages caused by such illegal action are recoverable by the injured party. **United Mine Workers of America v. Meadow Creek Coal Co.,** 263 F. (2) 52, C. A. 6th, cert. denied, 359 U. S. 1013; **United Mine Workers of America v. Osborne Mining Co.,** 279 F. (2) 716, C. A. 6th, cert. denied, 364 U. S. 881; **Gilchrist v. United Mine Workers of America,** 290 F. (2) 36, C. A. 6th, cert. denied, 368 U. S. 875; **Flame Coal Co. v. United Mine Workers of America,** 303 F. (2) 39, C. A. 6th. cert. denied, 371 U. S. 891. However, the Union is correct in its contention that these cases are not applicable to the present action against it. Those actions were not brought under the antitrust laws. Although a cause of action may exist for such damage under the common law or the Taft-Hartley Act, it does not follow that a cause of action also exists under Sections 1 and 2 of the Sherman Anti-Trust law where a combination or conspiracy in restraint of trade or an attempt to monopolize trade or commerce among the states must be shown. **Ace Beer Distributors, Inc. v. Kohn, Inc.,** 318 F. (2) 283, 286 C. A. 6th. The District Judge correctly charged the jury on this issue in stating to it that the activities of labor unions, which are not violative of the Sherman Act, do

not become violations of the Sherman Act even if such activities are carried out by violent means, and that acts of violence in and of themselves are not material to the determination of the question of whether the anti-trust laws were violated. However, it was not error for the jury to consider such evidence as bearing on the overall issue of whether such acts were done as part of a conspiracy to restrain competition or create a monopoly. **Apex Hosiery Co. v. Leader**, 310 U. S. 469; **Allen Bradley Co. v. Local Union No. 3, etc.**, supra, 325 U. S. 797, 809-811.

It must also be kept in mind in considering this appeal that we are not concerned with any alleged violation of the Taft-Hartley Act, which, as the District Judge correctly held in ruling on the Union's motion to dismiss the cross claim, is a matter within the exclusive jurisdiction of the National Labor Relations Board. **San Diego Building Trades Council v. Garmon**, 359 U. S. 236. We think that the Union's rights were fully protected in this respect by the charge to the jury that the Taft-Hartley Act is not one of the anti-trust laws, that the jury was not concerned with awarding damages for any violation of the Taft-Hartley Act, that it must consider simply whether there had been a violation of the anti-trust laws, not the Taft-Hartley Act, causing damage to Phillips, and that even if there was a violation of the Taft-Hartley Act, it would not on that account be a violation of the anti-trust laws.

The Union's main contention on this appeal is that the evidence was insufficient to take the case to the jury on the allegations of the cross claim that it conspired with certain large coal producing companies to restrain trade in the bituminous coal industry among the several states or to monopolize the trade in such industry among the several states, and that it was error for the District Judge

to overrule its motions for a directed verdict and for judgment notwithstanding the verdict.

The evidence in these cases is voluminous. It appears that many of the basic facts are not in dispute, although there is strong disagreement between the parties about the inferences or conclusions to be drawn from these facts. A review of the evidence in detail would unduly lengthen this opinion. We think it is sufficient to discuss some of the principal factual aspects of the case, which lead us to the conclusion that, although recognizing that some factual disputes may exist, yet taking that view of the evidence, with inferences reasonably and justifiably to be drawn therefrom, most favorable to the prevailing party, there is substantial evidence in the record to justify the submission of this case to the jury and to support the verdict. **Battjes v. United States**, 172 F. (2) 1, 5, C. A. 6th; **Local 175, etc. v. United States**, 219 F. (2) 431, 433, C. A. 6th, cert. denied, 349 U. S. 917. On this appeal we do not judge the credibility of witnesses or weigh conflicting evidence.

The Union contends that not only was there no direct evidence that it conspired with large coal companies, or with anyone, for the purpose of putting any operator out of business, but that there is the unchallenged testimony of its President and its Secretary-Treasurer that it at no time joined with or agreed with any coal operator for such purpose. But it is recognized that conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury even though there is no direct evidence that a conspiracy existed. It is the function of the jury to observe the witnesses while testifying, to appraise their credibility, to draw inferences from the facts estab-

lished, to resolve conflicts in the evidence and to reach ultimate conclusions of fact. **Eastern States Retail Lumber Dealers Ass'n. v. United States,** 234 U. S. 600, 612; **Local 175, etc. v. United States,** supra, 219 F. (2) 431, 433, C. A. 6th, cert. denied, 349 U. S. 917; **Loew's Inc. v. Cinema Amusements,** 210 F. (2) 86, 93, C. A. 10th, cert. denied, 347 U. S. 976.

In support of the basic theory of the cross claim that UMW and the major coal companies conspired to eliminate the smaller and weaker companies thus leaving the industry to the major coal companies alone, the following background was given to the jury. After World War II the economics of the Bituminous Coal Industry became unstable by reason of the fact that there was more coal being produced than the markets required; that before 1950 the major coal producers and the union were in agreement that the major problem of the industry was over-production and that the growth of smaller independent and non-union producers was contributing to the problem; that the major companies and the Union disagreed on how the problem should be handled; that on its side the Union was contending that the answer was to cut down on the working time of the producers; that the Union urged a three-day work week; that for many months before the 1950 contract was signed the Union took the initiative on this question and directed the working time of the men in the industry; that this domination of the men in the industry was interfered with by the passage of the new Taft-Hartley Act; that the Union's efforts to maintain closed shops and to maintain a Union controlled welfare fund were challenged and in some instances were defeated in the Courts by the major coal companies; that the major coal companies were opposed to the Union's dictating the working time of the men in the industry because it cut into profits.

Phillips contends that a marked change occurred in the relations of the Union and the major coal companies in 1950 as disclosed in their bargaining relations before and after that year; that the understanding at the time of the signing of the 1950 Wage Agreement was that the major coal companies were to decide on the working time for their employees; that this was a surrender on the part of the Union of its previous policy of seeking to control the economics of the industry by controlling the working time; that the understanding was that the problem of stabilizing the economics of the industry was to be taken care of by eliminating the smaller and weaker companies, leaving the industry to the major coal companies alone.

The following history of the Wage Agreements between UMW and the coal operators show the increased financial burden placed upon the operators over the period of 1945 through 1958.

UMW and mine operators have negotiated collective bargaining agreements since UMW's beginning in 1890 until the present time. Failure of collective bargaining purposes to function led to work stoppages and seizures and operations of the mines by the Federal Government on five occasions during 1943 through 1946. The National Bituminous Coal Wage Agreement of 1945 terminated pursuant to its terms on March 30, 1946. Collective bargaining between the Secretary of the Interior and UMW resulted in a contract increasing wages $1.85 per day, establishing a welfare and retirement fund of 5 cents per ton on all coal produced for use or for sale and continuing the nine-hour day with overtime for work in excess of seven hours per day and thirty-five hours per week.

Ensuing disputes thereafter resulted in UMW terminating the agreement, but negotiations were resumed and a new agreement was entered into effective July 1, 1947, which increased wages $1.20 a day, reduced the work day

to eight hours and increased payments to the welfare fund to 10 cents per ton. Following the resignation of the Welfare Fund's neutral trustee and a disagreement of the remaining two trustees with respect to pension payments, the UMW announced that the operators had dishonored the contract and a nationwide strike began in March 1948. The President invoked Taft-Hartley's national emergency provisions, a Board of Inquiry held hearings and injunction proceedings to enjoin the strike were instituted.

A new agreement was executed on June 25, 1948, which provided for an increase of $1.00 per day in wages and raised the royalty payment to the welfare fund to 20 cents per ton.

Under the 1950 agreement, executed on March 5, 1950, wages were increased 70 cents a day, and Welfare Fund royalties were increased from 20 cents to 30 cents a ton.

The 1951 agreement effective February 1, 1951, which amended the 1950 agreement, raised wages $1.60 a day to $16.35.

The 1952 agreement, effective October 1, 1952, raised basic daily wages $1.90 to $18.25, and increased fund payments from 30 cents to 40 cents a ton.

The 1955 agreement, effective September 1, 1955, raised wages in two steps for a total of $2.00 per day to $20.25, the vacation period was lengthened two days and vacation pay increased to $40.00.

The 1956 agreement, signed October 4, 1956, provided a $2.00 a day wage increase to $22.25 on a two-step basis. Vacation pay was raised $40.00 and for 1956 only a Christmas vacation period of three days with a $40.00 payment was provided.

The 1958 agreement, effective December 1, 1958, provided a two-step $2.00 a day wage increase, which brought

basic wages as of April 1, 1959, to $24.25 daily. Vacation pay was raised $20.00 to a total of $200.00 for a fourteen-day period.

The campaign to impose the wage contracts upon the smaller nonunion mines was intense after 1950. In areas of strong resistance mobs and terrorism were used. One or more of the major coal companies assisted in closing the operations of the principal union competitor of UMW in the bituminous coal labor field. We think the evidence supports the contention of Phillips that the Union knew that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements and that they would fall by the wayside by reason thereof, and that the increased costs in the successive agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs.

There was also evidence that before signing the Wage Agreement in October 1953 Phillips told the UMW representative that it was a new company just starting out and that it could not pay the wage scale or the 40 cents a ton to the Welfare Fund, and that the representative told them that they could work out their own working arrangements with their employees and pay whatever they could to the Welfare Fund. To its knowledge, no employee of the partnership belonged to the Union at that time and the Union did not represent the employees, although the Union succeeded in organizing the company later.

With respect to suits against coal operators in Tennessee for unpaid royalties, two suits were filed in 1954, no suits were filed in 1955, one suit was filed in 1956, no suits were filed in 1957, thirty-nine suits were filed in 1958, thirty-eight of which were pending as of December 1, 1960, when the tabulation was made, and seven suits were filed in

1959. It was the established policy of the Trustees to make no discounts or reductions or settlements for less than the full amount owed, irrespective of the economic condition of the operator. Many of the small operators were unable to meet the increased labor costs under the Wage Agreement and the payments to the Welfare Fund, and discontinued operations. Phillips strongly stresses the heavy increase in the litigation in 1958. The present action was filed against it on January 6, 1958.

The 1952 Wage Agreement contained a so-called "land-lease" provision under which the signatory operators agreed that the Wage Agreement covered the operation of all of the coal mines owned or held under lease by them or by any subsidiary or affiliate, or acquired during the term of the agreement. The evidence showed that there was a large reserve of coal lands owned or held under lease by the major coal companies. It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision.

The 1952 Wage Agreement contained a clause which provided that the signatory operators would not buy, sell or deal in coal mined by companies that did not pay the same labor costs as contained in the Wage Agreement. The major coal companies had the practice of frequently buying coal from the smaller companies to apply on their large long-term contracts. This market was eliminated for those small companies that could not operate under the provisions of the Wage Agreement.

There was evidence showing that UMW acquired outright 85,400 shares, out of 857,264 shares outstanding, of the common stock, and the entire 50,000 shares of the preferred stock of West Kentucky Coal Company, one of the

major coal companies, of which the Nashville Coal Company was a subsidiary. The common stock was acquired at a price of about $25.00 per share. Later, the stock market quotation rose to about $40.00 a share and thereafter declined to about $11.00 per share. The preferred stock was acquired at about $50.00 per share. The preferred stock became voting stock when dividends were in arrears. Arrearage dates back to April 1, 1958. On June 30, 1960, it was $309,375.00. In addition to the stock owned outright, UMW held substantial blocks of the stock of the two companies as collateral on loans. Under the provisions of many of these notes, which the collateral secured, the borrower was relieved from personal liability upon surrender of the collateral. The notes were renewed annually. If the interest was not paid, usually because dividends were not paid on the stock held as collateral, it was added to the principal of the renewal note. If the stock held as collateral declined in value, there was no demand for additional collateral. One of these loans in the amount of $2,513,895.18, secured by 90,600 shares of common stock of West Kentucky Coal Company, was to Cyrus S. Eaton, Chairman of the Board of West Kentucky Coal Company and Nashville Coal Company, as well as Chairman of the Board of Chesapeake & Ohio Railway Company, Steep Rock Iron Mines, Portsmouth Corporation, and a member of the Board of Cleveland Cliffs Iron Company, Cleveland Electric Illuminating Company, Kansas City Power & Light Company, and Sherwin Williams Company. This direct and indirect interest in the two coal companies totaled over $25,000,000.00. The shares of common stock of West Kentucky Coal Company owned outright and held as collateral totaled more than one-half of the outstanding common stock. It was not unreasonable for the jury to conclude from these facts that it was the purpose of the UMW to have a very material voice, if not the dominant one, in determining the policies and operations of these

two major coal companies, which, as is hereinafter pointed out are charged with playing an important role in the alleged conspiracy.

The evidence showed the large growth of the Tennessee Valley Authority steam plants, generating electricity by steam. The use of coal by TVA increased from 500,000 tons in 1950 to approximately 20,000,000 tons in 1956. The TVA plants were designed for the use of coal only. TVA buys coal under term and spot market bids. The spot market involves small orders of coal to be delivered in a short period of time, which offers definite advantages to small companies with weak financial resources, which can thus avoid long-term commitments. About seventy-five percent of TVA coal is bought on term contracts and about twenty-five percent on spot contracts. In 1955 UMW and two of the large coal producing companies successfully sought a determination by the Secretary of Labor of a minimum wage in the coal industry under the Walsh-Healey Act. The minimum wage determined was materially higher, in most instances twice as high, than the minimum wage determined in any other industry under the Walsh-Healey Act. This minimum wage determination prevented Phillips from bidding on the TVA term market, although it left open to Phillips for the time being the TVA spot market.

We believe that the following evidence is relevant on this phase of the case. At the 1956 Convention of the Union, President John L. Lewis introduced Secretary of Labor Mitchell, who, in the course of his remarks, spoke as follows:

> "I have had occasion, as Mr. Lewis has indicated, to work with your organization in the Department of Labor on many fronts. . . . As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry

which controlled the wages that were to be paid to workers who worked on government contracts. We purposely sought that determination in order to exclude from government bidding those nonunion mines which are a detriment to the industry. And I think by and large we have succeeded, except for certain areas of government purchasing which still have to be, shall I say, investigated. Twenty-five per cent, at the moment of the TVA purchases are made under contracts less than $10,000.00, which excepts such purchases from the determination of the Walsh-Healey Act. I have set in motion a study of the TVA purchasing policy to see if there is any evasion of the Walsh-Healey determination on the part of TVA. I don't know whether there is or not, but if there is, you can be sure that we will correct it: . . . I propose to continue this enforcement policy, because I believe it is in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, nonunion employer from competing in the market place with fair employers who hire union labor."

President Lewis, responding at the end of the speech, said:

"I am sure that the Chair voices the sentiments in the mind of every delegate in expressing our appreciation of the address of the distinguished Secretary of Labor. His personal assurance of his intention to fairly treat the men of the coal industry is bulwarked and borne out by his attitude in the entire period of three and a half years of his incumbency of that office."

Although this evidence was objected to by the Union, it was admitted by the District Judge with the cautionary admonition that the Secretary of Labor couldn't say anything that would prejudice the rights of the UMW unless the UMW authorized him to say it, or unless the UMW

approved what he said, or ratified what he said, or acquiesced in what he said. We are of the opinion that this evidence was not improperly received.

Contracts for less than $10,000.00 were not subject to the wage determination of the Walsh-Healey Act. Phillips sold coal on the TVA spot market under contracts for less than $10,000.00, thus avoiding the wage determination of the Walsh-Healey Act. About the end of 1956 the price of coal on the spot market began to decline, which continued through 1957 and 1958, finally reaching a very low figure in 1958. During 1956, 1957 and 1958 Pittsburgh-Midway Coal Co., Peabody Coal Co., West Kentucky Coal Co. and Nashville Coal Co., four of the large coal producing companies, made large offerings of tonnage on the TVA spot market at generally declining prices, with a number of such bids being successful. There was evidence that West Kentucky coal was sold extensively in the middle western market, most of it up and down the Mississippi Valley, that the middle western utility market had held up well, but that the distress coal which was for sale by West Kentucky Coal Co. and Nashville Coal Co., was for the most part thrown into the TVA market rather than the other market. There was also evidence that West Kentucky Coal Co., Nashville Coal Co. and Peabody Coal Co. did not make an analysis of the profit on the coal sold to TVA, the President of Peabody Coal Co. stating that he was "afraid to look at some of them." There was also evidence that the heavy offerings of West Kentucky coal on the TVA spot market would have the effect of bearing down on the price heavily.

We believe it was a reasonable deduction which the jury could make that the wage determination for the coal industry under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially and adversely affected the operations of Phillips in the im-

portant TVA market, thus contributing to the elimination of the company as a competitor to the large coal producing companies operating in that area, including the West Kentucky Coal Company, in which the UMW had such a dominant interest.

On the question of damages, Phillips introduced evidence showing the total tonnage it shipped on the TVA steam market in 1956, 1957 and 1958, the average price Phillips received for this steam coal, and the national average for all kinds of coal for those years. This is shown by the following table:

Year	Phillips Shipments	Price Received	National Average
1956.....	14,128.70 tons	$3.92	$4.82
1957.....	19,717.67	3.20½	5.08
1958.....	25,603.03	3.13⅓	4.86

The difference between what Phillips would have received in each of these years if it had received the national average and the amount it actually received was $12,715.83 in 1956, $37,003.49 in 1957, and $44,207.90 in 1958, or a total of $93,927.22. The jury by its verdict awarded damages in the amount of $90,000.00.

The Union challenges the sufficiency of this evidence to sustain an award of damages on the ground that the national average price of all kinds of coal does not afford a valid base of comparison with Phillips TVA coal. In particular, it contends that Phillips was a strip mine coal operator and that the national average price of all coal is substantially above the national average price of strip mine coal; that the utility market is the lowest coal market in price and may not be compared, pricewise, with the average market for all coal; that the spot market was the lowest part of the low-price utility market and that Phillips sold its coal on this lower priced spot market rather than

on the higher priced term market; and that Phillips sold its premium (block and egg) coal separately from its utility coal well above the prices received for its utility coal, but did not include receipts for its premium coal in its average price which is compared with the national average price of all coals.

These factors, if unexplained or unaccounted for, could have the effect of reducing the amount of the difference between the national average of all coals and the average price which Phillips received on the TVA spot market for steam coal, but in the light of other factors involved and brought out by the evidence, as hereinafter pointed out, we do not think the comparison was so unfair as to reject its consideration by the jury in its entirety in determining what, if any, damage Phillips suffered by reason of the conspiracy, if it found such a conspiracy existed.

In this connection there was evidence that the quality of steam coal, rather than the fact that it was deep underground coal instead of strip mining coal, was the important factor in the price; that the national average for high volatile bituminous coal was 12,900 BTU per pound, that the average for Tennessee high volatile bituminous coal was 13,460 BTU per pound; that Campbell County, Tennessee, coal, in which county Phillips operated, had an average of 13,200 BTU; and that there was a guaranteed minimum of 13,215 BTU per pound in the Phillips coal offered on a dry basis.

There was also evidence that the market for steam coal was not restricted to the utilities but included industrial concerns and railroads, and that the higher priced coal sold at retail had fallen from 20 per cent of the total in 1940 to 8 per cent in 1958. Although the fact was a disputed one, there was evidence to the effect that the difference between the national average price for all bituminous coal and the price received by Phillips for steam coal was not

materially affected by the fact that the national average price was for all bituminous coal, including so-called premium coal, and that the coal sold by Phillips on the TVA market did not include premium coal.

It is true that damages which are speculative cannot be recovered. But that does not mean that when damages have resulted from a wrongful act, they cannot be recovered because they are uncertain in amount or because the injured party cannot show with certainty the exact amount of damage incurred. It is enough if the evidence shows the extent of the damage as a matter of just and reasonable inference, although the result be only approximate. **Story Parchment Co. v. Paterson Parchment Paper Co.**, 282 U. S. 555. We are of the opinion that the evidence in the present case brought the case within that rule. The District Judge instructed the jury at length upon the question of damages. In our opinion, the rights of the Union on the question of damages were fully protected.

UMW contends that the District Judge erred in admitting evidence with reference to the Walsh-Healey prevailing wage determination and having TVA comply therewith, and in charging the jury concerning UMW's efforts to obtain Walsh-Healey prevailing wage determinations and to have TVA enforce such wages. It relies upon **Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.**, 365 U. S. 127. It was held in that case that no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws, and that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.

With respect to the Walsh-Healey Act, the District Judge charged the jury:

"Any approach to the Secretary of Labor, which was designed to raise the minimum wages to be paid by coal operators doing business with the TVA or other governmental agencies, was not a violation of the antitrust laws. Therefore, you will not give any consideration whatever to this approach to or meeting with the Secretary of Labor, unless you find that the approach to the Secretary of Labor was a part of the conspiracy to get the prevailing wages establish (sic) in the coal industry so high as to drive the small operators out of business."

UMW contends that although the first part of this instruction was in accordance with the ruling in the **Noerr** case, it was error to qualify the instruction by the concluding words, "unless you find. . . ."

The District Judge also instructed the jury that it was no violation of the antitrust law for the Union or the coal operators to urge the TVA to abide by the spirit and letter of the Walsh-Healey Act or to modify its methods of buying coal, "unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business." The qualifying words in this instruction are likewise complained of.

We do not construe the **Noerr** ruling as creating an unlimited exemption to Sections 1 and 2 of the Sherman Anti-Trust Act. We believe that the **Noerr** ruling had reference to conduct which in good faith looked to the enforcement of the law or a modification of an existing policy, unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal. We find no error in the two instructions complained of.

Complaint is also made of the admission in evidence by the District Judge of statements of George Love, an alleged

co-conspirator, before a prima facie case of the alleged conspiracy was presented. In doing so, the District Judge told the jury, "before these statements are competent as evidence and binding upon any alleged co-conspirator, the jury will have to find that there was a conspiracy and that such statements were made in furtherance of the conspiracy." We find no error in admitting the statements before presenting a prima facie case of the alleged conspiracy, provided that the admission in evidence is conditional upon such proof of the conspiracy being later introduced, as the jury was instructed in this case. The District Judge has a wide discretion in controlling the order of proof. **United States v. Manton**, 107 F. (2) 834, 844, C. A. 2nd, cert. denied, 309 U. S. 664; **Flintkote Company v. Lysfjord**, 246 F. (2) 368, 378, C. A. 9th, cert. denied, 355 U. S. 835. We find no merit in the contention that without the statements of Mr. Love, the evidence was insufficient to support the allegation that a conspiracy existed.

Accordingly, the judgment in case No. 14809 is affirmed.

Case No. 14810.

In this case the jury found that the Trustees of the Welfare Fund engaged in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states. The District Judge was of the opinion that there was no substantial evidence to support the verdict, set aside the verdict, and entered judgment for the Trustees notwithstanding the verdict, although in a reduced amount from that asserted by the Trustees.

On this appeal Phillips contends that the verdict is supported by evidence from which it could reasonably be concluded that (1) the Trustees paid benefits only to members of UMW; (2) the Trustees required the beneficiaries of the trust to picket or perform other acts for the UMW in order to obtain or retain pension benefits, or acquiesced

in the doing of these things by the beneficiaries; (3) the Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced; (4) the Trustees held out to the men in the industry that the Fund was under union control; and (5) the Fund, in fact, was under the domination and control of the UMW.

In setting aside the verdict the District Judge expressed the opinion that the action of a majority of the Trustees was required to bind the fund (see **Van Horn v. Lewis**, 79 F. Supp. 541, D. C. D. C.); that the action of John L. Lewis, President of UMW, alone, without authorization or consent of the majority of the Trustees, was not sufficient to show that the Trustees conspired with the large coal operators to drive a small operator out of business, and that there was no evidence to support the finding that Mr. Lewis, for himself and another of the Trustees, entered into the alleged conspiracy.

We are of the opinion that the District Judge was not in error in setting aside the verdict and entering judgment for the Trustees notwithstanding the verdict. We find no direct evidence that the Trustees participated in the alleged conspiracy, and the inferences which Phillips would have us draw are not justifiable or reasonable in the light of the strong and uncontradicted testimony of the Trustees themselves. We concur in the opinion of the District Judge in his analysis of the evidence on this aspect of the case, to which we refer.

Since the District Judge ruled that the evidence was not sufficient to sustain the verdict that the Trustees engaged in a conspiracy to unreasonably restrain interstate commerce in violation of the Sherman Act, it was not necessary for him to rule upon Phillips' contention that such a violation of the Sherman Act, if it had occurred, was a bar to the right of the Trustees to recover in this action. How-

ever, should it be that that ruling and our concurrence in it is not the correct one, we are nevertheless of the opinion that, contrary to the contentions of Phillips, the verdict of the jury was not a bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined. **Kelly v. Kosuga,** 358 U. S. 516; **Connolly v. Union Sewer Pipe Co.,** 184 U. S. 540, 549; **D. R. Wilder Mfg. Co. v. Corn Products Refining Co.,** 236 U. S. 165.

Phillips also attacks the validity of the contract under which the Trustees are seeking a recovery on two other grounds. (1) It is contended that UMW had not performed the statutory requirements necessary to be performed before a valid union security clause could be inserted in the contract between it and Phillips, and since the contract contained such a union security clause, it rendered the contract invalid. (2) It is contended that since the evidence shows that the contract was forced upon Phillips through threats and violence and Phillips' employees were in like manner forced to join the Union in order to make it possible for Phillips to operate its mines, this constituted an unfair labor practice on the part of the Union under the Labor-Management Relations Act, Sections 157 and 158 (b), Title 29, United States Code, which, in turn, rendered the contract void in its entirety.

We doubt that these issues are before us on this appeal. They were not submitted to the jury and no facts were found by the jury with respect thereto. On the contrary, the District Judge instructed the jury:

> "The sole question for you to decide in the suit of the Trustees is whether the plaintiff Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged by Phillips Brothers."

Twice thereafter in his charge, the District Judge repeated the substance of this instruction to the jury. Following the instructions and a consideration of the UMW's objections to the charge, counsel for Phillips stated to the Court:

> "If your Honor please, the defendants and cross-plaintiffs have no exceptions to the charge and no requests for additional charges."

Lively v. Elkhorn Coal Co., 206 F. (2) 396, 399, C. A. 6th. Nevertheless, we will briefly answer these two contentions.

The first contention is rejected on the authority of **N. L. R. B. v. Rockaway News Supply Co.**, 345 U. S. 71, and **Lewis v. Benedict Coal Corporation**, 361 U. S. 459, 468-470.

In support of the second contention, Phillips relies upon **International Ladies' Garment Workers' Union v. N. L. R. B.**, 366 U. S. 731. In that case the employer entered into a collective bargaining agreement with a union which represented only a minority of the employees. The Labor Board found that both the employer and the union were guilty of an unfair labor practice, ordered the employer to cease and desist from giving effect to the collective bargaining agreement, and directed the holding of a representation election. The Court of Appeals granted enforcement of the order. The Supreme Court affirmed. In doing so, it said:

> "On the facts shown, the agreement must fail in its entirety. It was obtained under the erroneous claim of majority representation."

We think that statement must be construed in the light of the circumstances under which it was made. The Court did not have before it the question of the validity of the contract in a common law action to enforce it. The issue which it was passing upon was whether the execution of

the contract constituted an unfair labor practice, and, if so, what was the proper remedy. The remedy was to direct the parties to cease and desist from operating under it. Because of the unfair labor practices the agreement failed to be binding on the parties. The same might be true of the bargaining agreement in this case if this was a proceeding before the Labor Board involving an alleged unfair labor practice. But it is not that kind of a proceeding, over which the Labor Board has exclusive jurisdiction. **Portland Web Pressmen's Union v. Oregonian Publishing Co.**, 286 F. (2) 4, C. A. 9th, cert. denied, 366 U. S. 912. Neither the District Court nor this Court has jurisdiction to find either of the parties to the bargaining agreement guilty of an unfair labor practice, and no such finding has been made. In the absence of such a proceeding and finding, we are of the opinion that the ruling in **International Ladies' Garment Workers' Union v. N. L. R. B.**, supra, 366 U. S. 731, is not applicable.

In any event, with respect to the coal already mined and the rights accrued thereby, we are of the opinion that the Trustees' right to recover is not barred. **Lewis v. Benedict Coal Corporation**, supra, 361 U. S. 459; **Kelly v. Kosuga**, supra, 358 U. S. 516.

The judgment in case No. 14810 is affirmed.

STATUTES INVOLVED.

Sherman Act and Clayton Act provisions:

> "Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. A., Sec. 1.
>
> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor." 15 U. S. C. A., Sec. 2.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. A., Sec. 15.

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U. S. C. A., Sec. 17.

Provisions of the National Labor Relations Act and Labor-Management Relations Act:

"Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title." 29 U. S. C. A., Sec. 157.

"Unfair labor practices.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organi-

zation is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and **has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance** with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. (Emphasis added.)

* * * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U. S. C. A., Sec. 158 (Prior to amendment of Sept. 14, 1959).

"Filing by Union of its constitution, by-laws, and report; contents of report—

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) of this subsection were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the

procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) of this sub-division to be filed with the Secretary of Labor.

"Annual reports by Union; contents—

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B) of this section. No labor organization shall be eligible for certification under this section as the representative of any employees and no complaint shall

issue under section 160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"Affidavits showing Union's officers free from Communist Party affiliation or belief.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits. 15 U. S. C. A., Sec. 159 (Prior to amendment September 14, 1959).

"Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any

of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall

agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities. 29 U. S. C. A., Sec. 186.

TERMS OF THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT INVOLVED.

The provisions of the National Bituminous Coal Wage Agreement particularly involved are:

"It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law. . . ."

"United Mine Workers of America Welfare and Retirement Fund of 1950.

"A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created

a Fund to be designated and known as the 'United Mine Workers of America Welfare and Retirement Fund of 1950.' During the life of this Agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30¢) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

"The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado, is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

"In the event of a deadlock on the designation or agreement as to any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting

parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302 (c) of the 'Labor-Management Relations Act, 1947.'

"It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

"It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the 'Labor-Management Relations Act, 1947,' and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the 'Labor-Management Relations Act, 1947,' as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the

operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid 'Labor-Management Relations Act, 1947.' Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

"The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

"It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon.

"Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign,

pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i. e., the beneficiaries of said Trust under the terms of this Agreement.

"The obligation to make payments to the 'United Mine Workers of America Welfare and Retirement Fund of 1950,' under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

"It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement."

* * * * * * *

"Action which may be required hereunder by the Operators for the appointment of a successor Trustee representing them, or which may be required in connection with any other matter hereunder, may be taken by those Operators who at the time are parties hereto, and authorization, approval, or ratification of Operators representing fifty-one percent (51%) or more of the coal produced for use or sale during the calendar year previous to that in which the action is taken shall be sufficient and shall bind all Operators."

"Integrated Instrument

"This agreement is an integrated instrument and its respective provisions are interdependent . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 39

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admr., of the Estate of Burse Phillips, Deceased, *Petitioners*,

v.

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE as Trustees of the United Mine Workers of America Welfare and Retirement Fund, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 867

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admr., of the Estate of Burse Phillips, Deceased, *Petitioners*,

v.

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court[1] rendered a Bench Opinion which appears in the printed certified appendix[2] at pp. 85-

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[1] United States District Court for the Eastern District of Tennessee, Northern District.

[2] The printed certified appendix was filed by Petitioners herein (called "Phillips") as part of the Record to be found in the Clerk's office of this Court. Pagination references are to the printed certified appendix. The petition is abbreviated herein as "P." The abbreviation "A." refers to the appendix to this Opposition Brief. *Unless otherwise indicated, all emphases are supplied.*

99a. The portion thereof which pertains to the Respondent Trustees' instant case (No. 14,810 in the Sixth Circuit)[3] appears at pp. 95-99a and is printed herein as Appendix A. Likewise, the district court's judgment as to Respondent Trustees' case, found at pp. 82-84a of the printed certified appendix, is printed herein as Appendix B.

The Sixth Circuit's opinion is reported at 325 F. 2d 804 (Adv. Op. February 1, 1964) and in the certiorari petition at p. 75 *et seq.* The portion thereof which deals expressly with Respondent Trustees' case (No. 14,810) is found at 325 F. 2d 817-19 and in the certiorari petition at pp. 100-104.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

Pertinent statutory provisions appear in the Appendix to the certiorari petition at pages 104-112.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Sixth Circuit err in its concurrence with the district court that the evidence was not sufficient to sustain a jury verdict that the Trustees engaged in a conspiracy to unreasonably restrain interstate commerce in violation of the Sherman Act?

2. Does a finding of conspiracy by a labor union and certain operators signatory to a collective bargaining agreement, in violation of the Sherman Anti-Trust Act, preclude as a matter of law the right of Trustees of

[3] The United States Court of Appeals for the Sixth Circuit.

a trust created in the bargaining agreement to recover royalties therein provided for from an operator signatory to the Agreement?

3. Is the right of Trustees herein to recover unpaid royalties admittedly due by an operator signatory to the collective bargaining agreement to be defeated as a matter of law solely by a defense that the operators' employees were coerced into joining a labor union, when there has been no employee complaint thereof and after the employees have produced coal entitling Trustees to recover such royalties on their behalf?

4. Even assuming the evidence warranted a finding UMW had not performed the statutory requirements necessary to be performed before a valid union shop clause could be inserted in the contract between UMW and Phillips, does the fact that the agreement between Phillips and UMW contains the union security clause render the contract invalid and defeat the claim of Trustees herein?

COUNTERSTATEMENT OF THE CASE

A. TRUSTEES SUE TO RECOVER UNPAID ROYALTIES; AND THE SIXTH CIRCUIT AFFIRMED THE JUDGMENT IN TRUSTEES' FAVOR.

The National Bituminous Coal Wage Agreement of 1950 created the "United Mine Workers of America Welfare and Retirement Fund of 1950", called "Fund" (1114a), by the terms of which "each operator signatory" covenanted to pay into the Fund a specific sum of money for each ton of coal produced for use or for sale. All moneys paid into and/or due and owing Fund were vested exclusively in its Trustees (1116a). The 1950 Agreement, as subsequently amended in 1952, in 1955 and in 1956, set the per-ton payments at forty cents (1189-90a).

Phillips, admittedly signatory to the 1952, 1955 and 1956 Agreements (117a), failed to perform its covenants to pay and Fund Trustees instituted a district court action to recover a money judgment against Phillips for royalties on coal admittedly produced by it for use or sale under the Agreements (13a, 117a).

In a jury trial, wherein the district court instructed the jury that Phillips' sole defense is "the collective bargaining agreement was an instrument used in an alleged conspiracy allegedly participated in by the Trustees, the Union, and certain coal companies allegedly violative of" the Sherman Anti-Trust Laws (1572a, 1537-38a),[4] the jury found Trustees had so conspired (1588a). Upon Trustees' post-verdict motion for judgment n.o.v. or new trial (73-82a), the district court set the jury verdict aside, held "as a matter of contract" Trustees were entitled to recover unpaid royalties due them, excluding those "that accrued before a majority of Phillips' employees became UMW members on April 25, 1955" (98-99a) on the basis of principles announced in *International Ladies Garment Workers' Union, AFL-CIO* v. *NLRB*, 366 U.S. 731. It entered judgment in Trustees' favor against Phillips for $43,424.22 (83a; A. 5a).

Upon Phillips' appeal, the Sixth Circuit (325 F. 2d 819) affirmed the judgment, held the jury verdict "was not a bar" to Trustees' right to collect royalty payments under the contract on coal already mined, rejected Phillips' contention the bargaining agreement's union security clause precluded Trustees' recovery,

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[4] Phillips' several answers are found at 11a, 21a, 26a and 30a. By pre-trial order, the parties stipulated their respective theories (48a) which also appear in the district court's jury charge (1537a et seq.). Relevant provisions of the Sherman Act (15 USCA) are printed in the petition's appendix, pp. 104-105.

and swept aside Phillips' contention the manner in which Phillips executed the labor agreement and its employees became UMW members also precluded Trustees' right to recover royalty on coal already mined (325 F. 2d 818-19).

B. THE DISTRICT COURT REJECTED THE JURY'S VERDICT THAT TRUSTEES ENGAGED IN A CONSPIRACY.

Summarized, the overt acts which Phillips contended Trustees committed in furtherance of the alleged conspiracy, which Trustees denied, were included in the jury charge with Phillips' acquiescence (1539-40a, 1573a) and are: (1) The Fund was in fact under UMW's domination and control; (2) Trustees held out to the men in the industry the Fund was under union control; (3) Trustees paid benefits only to UMW members; (4) Trustees required (or stood by) as Fund beneficiaries picketed for UMW in order to obtain or retain Fund benefits; and (5) As a punitive measure, Trustees instituted legal actions against coal operators to recover royalties on coal produced.

In submitting to the jury for answer Form No. 1, reading (1577-8a):

> "Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states as alleged by the original defendant, Phillips Brothers Coal Company?",

the district court told the jury (1572a) the Fund was created pursuant to Taft-Hartley's Section 302,[5] and provided for benefit payments to signatories' em-

[5] Labor Management Relations Act is called herein "Taft-Hartley". Its Section 302 [29 USCA 186] appears in the Appendix to the certiorari petition (P. 110-112) in part.

ployees, including Phillips'. The jury charge recognized —with Phillips' agreement—that Fund's Trustees had no legal right to require or not to require Fund beneficiaries to picket on behalf of UMW in labor matters (1572-3a); Trustees were legally obligated to collect all moneys due the Fund and to use all reasonable means to effect collection, including lawsuits (1573a); *that standing alone*, even the alleged acts that Trustees paid benefits only to UMW members, that Trustees, as a punitive measure, instituted actions to recover royalties, that Trustees required beneficiaries to picket to obtain or retain pension benefits "would not show" Trustees were co-conspirators (1573a) and that the "acts of individuals, unless you find from the evidence that the Trustees *actually participated in, or actually authorized such unlawful act, if any, or ratified such act, if any, after actual knowledge thereof*", would not bind Trustees "to make them parties to an alleged conspiracy" (1573a).[6]

The District Court's Reasons for Setting Aside the Jury Verdict

In setting aside the jury verdict, the district court held *"there is no material or substantial evidence in this record to support the"* jury finding that Trustees conspired as Phillips charged (83a, A. 6a).

The trial court found "no evidence that either" Trustees Boche, Schmidt or Owen (deceased) "had any dealings with large coal operators" from which to infer "they agreed, combined, or conspired to stabilize coal prices" (96-7a, A. 3a). These persons, the trial court noted, were the only ones, except for John L. Lewis, to serve the Fund after 1950. Citing *Van Horn*

[6] Following the jury charge, Phillips announced *"no exceptions to the charge and no requests for additional charges"* (1585a).

v. *Lewis*, DC,D.C., 1948, 79 F. Supp. 541, the trial court noted, "Action of a majority of the Trustees is required to bind the Fund" and that Lewis' action "alone without authorization or consent of a majority of the Trustees would not be sufficient . . . to bind the Fund or to show the Trustees conspired with large coal operators to drive a small operator out of business" (96-7a). Had Lewis controlled the other Trustees' actions when "this alleged conspiracy was formed", then "this might present a different question" but "there is no evidence to support the verdict of the jury that Mr. Lewis, for himself and another of the Trustees, entered into the conspiracy so as to bind the Trustees either individually or in their capacity as trustees or to bind the Trust Fund" (97a, A. 3-4a).

The district court rejected each of the overt acts (A. 3a-5a) Phillips contended proved Trustees guilty of conspiring (97a-98a). "It is true that there are some suspicious circumstances", declared the trial court, but "Substantial evidence means more than merely the suspicion of the existence of a fact" and "a juror's verdict cannot be based upon suspicion alone" (98a, A. 5a).

C. THE SIXTH CIRCUIT CONCURRED IN THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS THAT TRUSTEES WERE NOT GUILTY OF THE CONSPIRACY CHARGED.

Upon Phillips' appeal (101a), the Sixth Circuit opined "the District Judge was not in error in setting aside the verdict and entering judgment for the Trustees notwithstanding the verdict" (325 F. 2d 818). It found "no direct evidence" Trustees "participated in the alleged conspiracy, and the inferences which Phillips would have us draw are not justifiable or reasonable in the light of the strong and uncontradicted

testimony of the Trustees themselves" (325 F. 2d 818). It concurred in the district court's analysis of the evidence (325 F. 2d 818).

D. FACTS SHOWING THAT BOTH LOWER COURTS CORRECTLY CONCLUDED TRUSTEES DID NOT ENGAGE IN THE ALLEGED CONSPIRACY.

1. The Sixth Circuit Correctly Approved the District Court's Conclusion That the Evidence Was Insufficient to Show UMW Dominated or Controlled the 1950 Fund

Notably, the Sixth Circuit premised its sanction of the district court's action in setting aside the jury verdict because of the "strong and uncontradicted testimony of the Trustees themselves" (325 F. 2d 818). The propriety of the Sixth Circuit's holding is manifest from the following undisputed facts:

Trustees Deny UMW's Control of the Fund

Uncontradicted is Lewis' statement that UMW always conceded to operators the right to select their own nominee for the operators' trustee position (291a) and that he refuted Love's "stooge" statement, described as "a propaganda statement" made in a "highly emotional state" vowing Love "like many operators, was carried away by his own fervor, to make untrue and incorrect statements" (292a).

Every trustee was told that, once seated, he was no longer agent of the parties nominating him and his sole fealty thereafter was to operate the trust for the purposes and in the manner specified by law (293a).

Lewis avowed his "meticulous adherence" to the "good faith administration of that policy". To Trustee Roche, the Trustees' "obligation is completely to the sound administration of the trust . . . to operate it in conformity with the trust agreement," and "the National Labor Relations Act" and "to administer the trust soundly in the long-range interest to all benefici-

aries who are eligible for benefits" (1044a). Similarly, Trustee Schmidt expressed his role "solely in the capacity of an individual responsible only to my conscience" and to the Fund's principles and objectives (1060a). Asked if Lewis sought to control the handling of the trust, Roche answered, "No, sir, never" (1043a). Both Roche (1044a) and Schmidt (1060a) deny Lewis dominated the Fund. Matters coming before the Trustees were discussed "in formal session" at length. On a percentage basis, "Roche takes up most of the time, and [Schmidt] comes next, and Mr. Lewis is a very poor third. He listens most of the time" (1061a). These recitals stand undisputed.

Though Phillips complains (P. 30) that nomination of trustees was not properly a bargainable issue, Taft-Hartley's Section 302(c) [29 USCA 186(c)] mandates "employees and employers" must be "equally represented" and the 1950 Agreement records Lewis as the employees' choice, and Charles A. Owen as the operators' choice. *There is no evidence Owen was not the operators' free choice.* While the statute provides the neutral trustee be chosen by the employer and employee representatives [29 USCA 186(c) (B)], Phillips' complaint (P. 30) that Roche, as the neutral trustee, was named in the 1950 Agreement ignores Roche's *undisputed* avowal she was *"named by the other trustees in the contract"* (1017a).

The district court, with the Sixth Circuit's approval, declared "Trustees testified *positively* that the Union did not dominate or control the Fund" and "The evidence is insufficient to show the contrary" (A. 4-5a). No evidence offered by Phillips challenges this affirmative, positive proof.

A U. S. Senate Subcommittee Approved the Fund's Activities.

Propriety and legality of Trustees' actions are reflected in a report of a subcommittee of the United States Senate on April 6, 1956, stating the Fund "is honestly and well administered", "providing benefits efficiently and at low administrative cost"; "the pension plan is carefully administered, with pensions given to those who meet the eligibility requirements established by the Trustees, and withheld from those who do not"; and concluding that the "total picture" of the Fund discloses "a far-flung, pioneering, and well run program" (352-4a).

Recent Trustees' Resolutions Do Not Evidence a Conspiracy.

Phillips argues (P. 49) that proof that Trustees engaged in the conspiracy is a recent resolution, passed by Trustees, rendering ineligible for benefits unemployed miners who join to open small mines because of lack of other employment. Phillips ignores the relevant fact that as such miners form small companies and become "connected" with a mine's management they lose their identity *as employees* of signatory operators and are denied benefits even though they remain UMW members, thus showing that *employee status* and *not union membership* is the basis for a benefits award—an element fully discussed *post*, p. 16 et seq.

The Sixth Circuit Tacitly Rejected Phillips' Baseless Attack on the Trustees.

Though Phillips' position that UMW dominated and controlled the Fund to force small coal operators out of business is totally without any evidentiary basis, Phillips employed it in the lower courts and now in this Court to conduct a scurrilous and unwarranted attack on the personal integrity and character of Trustees

Lewis, Schmidt and Roche. The trustee appointed by management and the trustee chosen to represent the public interest have been characterized as "stooges" of Trustee Lewis on the fallacious premise that Lewis would not permit the other Trustees to exercise independent judgment or to maintain personal integrity. What does the record have to say about these persons both as individuals and as Trustees?

For the better part of the past fifty years, Trustee Roche has been a dedicated servant of the people of this country: A noted social worker (1006-11a); an aide to Herbert Hoover in Belgium Relief (1008a); an active participant in enacting child labor laws (1009-10a); an appointee of President Wilson to an important committee composed of cabinet rank officials (1009a); the Assistant Secretary of the Treasury under President Roosevelt (1013a), assisting in the development of the Public Health Service and the Social Security Act; the Director of the 1947 Fund (1015a), developing policies and procedures to effectuate a totally new concept in labor relations; and finally Trustee as well as Director of the 1950 Fund named by the other trustees in the contract (1017a).

Trustee Schmidt, equally distinguished, progressed from a "molder's helper" shoveling sand (1049a) to "manager of the engineering staff" of Goodyear Tire & Rubber Company (1051a), and for the last eighteen years, he has been North American Coal Corporation's chief executive officer (1052a). He became a Fund Trustee in May, 1958 (1053a) without opposition or complaint from *any* coal operator (1055a), either at the time of, or since, his appointment (1055a). Schmidt, as a trustee, regarded the payment to his Trustee predecessor of $35,000 as "wrong" (1053a,

1062a) and he feels he owes it "to the industry, . . . to the coal miners, to society, to give some of my time to this great effort" which "provides welfare services, health and medical services to coal miners . . . and to provide pensions, and . . . to help the survivors of mine disasters" (1062a).

Thus, the record condemns the accusation that Trustees Schmidt and Roche could be bought or forced to participate in a conspiracy to violate the laws of the United States, or that Trustee Lewis would attempt to require illegal acts.

To prove Roche was one of the "stooges" Love mentioned, Phillips point out (P. 31) that Roche stated prior to her appointment as Trustee she had no previous connection with UMW and then, as if there were a discrepancy, notes that UMW admitted its purchase of 222,720 shares of stock in Rocky Mountain Fuel Company of which Roche was president and chief owner. The evidence does not show the stock was purchased from her, and it does not reveal Roche gained personally from UMW's purchase and owership of Rocky Mountain Fuel stock. Again, the stock was acquired "subsequent to the closing down of that company and while it was in liquidation" and it was "a non-operating, non-producing coal company" (349a, 1243a). Though Phillips now seeks to imply improper UMW influence from such stock purchase, significantly Phillips did not cross-examine Roche concerning this matter.

When Trustee Roche became associated with the Fund, "she was no longer an active operator representing the industry and the company was not operating" (349a). Phillips' unfounded charge is made in the face of uncontradicted evidence that Trustee Roche

"was recognized as the best qualified person that was available for the public trusteeship" (349a), which is affirmed by the entire record in this case.

Although Trustee Schmidt became a Trustee only eight months before the end of the period of the alleged conspiracy, he did not escape Phillips' baseless innuendo he too conspired to violate a federal statute. While Phillips, in the trial court, presented the impression that Trustee Schmidt was a person whose "eyes" have been "willfully closed to the conditions, to the Trustees' affairs" (T. 3368)[7] with respect to pensioners being required to picket, punitive lawsuits and payments of Fund benefits only to UMW members, the record totally destroys any basis for this fanciful suspicion and conjecture. Trustee Schmidt stands uncontradicted that the Fund's policies have "been carried out to the best of my knowledge, and right out all through the administration of the Fund" (1059-60a).

As already noted, the Sixth Circuit sanctioned the district court's action in setting aside the jury verdict because of the *"strong and uncontradicted testimony of the Trustees themselves", thus tacitly rejecting and stamping as baseless Phillips' attack upon the Trustees.*

Phillips' Contention That UMW Sought to Control the Fund Before 1950 is Both Irrelevant and Unsupported by the Evidence.

Phillips fails to disclose that two welfare funds anteceded the 1950 Fund which is involved herein: (1) an initial welfare and retirement fund in a May 29, 1946 labor agreement between UMW and the federal government resulting from UMW's dispute with coal operators and following government seizure of coal

[7] The abbreviation "T." refers to the transcript of the proceedings in the trial court.

mines, and (2) the 1947 Trust Fund created in the 1947 Agreement, the trustees of which were John L. Lewis, Ezra Van Horn and Thomas Murray.

To prove the evidence supported the jury verdict that UMW controlled the 1950 Fund, Phillips relies (P. 25) upon matters allegedly occurring *in 1948*, despite Phillips' allegations the conspiracy did not occur until 1950 (31a) and the 1950 Fund had no existence prior to March 5, 1950. Since there are three Trustees appointed to administer the 1950 Fund, each with the same authority (*Van Horn* v. *Lewis*, DC, D.C., 1948, 79 F. Supp. 541), Phillips fails to explain how matters ante-dating the 1950 Fund's existence and the Trustees' appointments as such could be imputed to them when their trustee status was neither *de facto* nor *de jure*.

In the 1948 Van Horn-Lewis Dispute, the Federal Court Vindicated Lewis.

The "long and bitter" fight Phillips charges (P. 26) Lewis had with Trustee Van Horn also occurred *in 1948;* and while Phillips claims this struggle related "to how the Fund should be managed" (P. 26), the litigation story told in *Van Horn* v. *Lewis*, DC, D.C., 1948, 79 F. Supp. 541, judicially refutes Phillips' position and records that Lewis' dispute with Van Horn concerned a resolution *to activate the pension fund*, which Van Horn opposed, but which the federal district court approved, together with an order mandating that a majority of Trustees (Lewis and Bridges) had the right to act in the trust's activation and administration.

The Lewis-Dawson Incident.

As Phillips concealed the litigation story in *Van Horn,* so too it fails to disclose relevant matters in the Lewis-Dawson incident which does not, in any event, prove Phillips' contention that UMW sought to name and control the Fund's Trustees (P. 26-29).

The 1948 Agreement expired June 30, 1949, and a successor contract was not executed until March 5, 1950. In the interim there existed no collective bargaining agreement although miners worked intermittently.

Van Horn resigned as Trustee because of dissatisfaction within the coal operators' group responsible for his appointment as Trustee; it had no relation to UMW (295a).

In two appearances at Trustees' meetings in the fall of 1949, Judge Charles I. Dawson claimed his appointment as a Fund Trustee (521a, 523a). Lewis admits Dawson's presence "not as a Trustee" but under a privilege to state to incumbent Trustees his right to be qualified, a claim not accepted by Trustees Lewis and Bridges (297a).

Though operators notified Lewis of Dawson's majority vote (296a), Trustees had not accepted Van Horn's resignation (299-300a) and Dawson's certification was not a "compulsive document" because the "manner of conducting the election" was open to criticism (300a).

The Dawson incident was eliminated by the 1950 Agreement's execution on March 5, 1950 which, *creating the 1950 Fund,* named Charles A. Owen of New York City as Operators' nominee, Lewis as that of

UMW and Josephine Roche as the Fund's neutral Trustee.[8]

Phillips stresses (P. 29-30) that during the 1949-50 negotiations antedating the 1950 contract, George Love, a principal Operator negotiator, stated UMW attempted to name "stooges" to serve as the Fund's Operator and neutral Trustees and that the identity of such Trustees was an issue. No evidence is even suggestive the "stooge" remark had reference to Trustee Owen (now deceased) or to Trustee-Director Roche. Moreover, the UMW-Operator struggle in 1949-50 was the subject of multiple litigation in the federal courts (1474-86a). *In none of variable suits instituted by Operators* and processed by variant governmental agencies, *was there ever complaint UMW sought to control the naming of the Trustees.*

2. The Sixth Circuit Correctly Concurred in the District Court's Conclusion That Union Membership Was Not a Prerequisite for Obtaining Fund Benefits After 1950

The Sixth Circuit agreed with the district court's conclusion (A. 4a), "The evidence is reasonably clear that Union membership was not a prerequisite for obtaining benefits from the Fund after 1950."

In urging the lack of supportive evidence (P. 32 et seq.), Phillips ignores crucial facts: (1) a federal district court enjoined UMW in 1950 from insisting on a fund "to be administered so as to provide benefits therefrom for 'UMW members only' " on the ground that a UMW-members-only fund would be incompatible with Taft-Hartley's Section 302(c); (2) there was judicial recognition of UMW's obedience thereto, and (3) *Phillips* acquiesced to the trial court's jury

[8] Dawson's suit to compel recognition as a Trustee (525a) was dismissed (526-27a).

charges that *the trust* agreement accorded with requirements of Taft-Hartley and "The trust agreement provides for the payments of benefits *to employees of signatory operators,* of which Phillips Brothers was one" (1475-86a, 1572a).

Further, *UMW membership is not, and has not been, a prerequisite for obtaining benefits from the Fund of 1950.* Trustees Lewis, Schmidt and Roche, and Trustees' counsel Mitch so avow (1026a, 1059a, 1119a, 1074a, 1076a, 1078a). Notably missing from eligibility requirements published by Trustees in each annual Fund report beginning June 30, 1951 through 1958 (Exhibits 128-137, 1026-27a)[9] is a requirement that applicants be UMW members. *The prime requisite therefor is that applicants be employees of a signatory operator;* and "Union membership has nothing to do with it" (1074a). UMW members working in non-union mines could not qualify for Fund benefits (1085a). Even UMW members failing to meet requirements have been rejected (1079a), whereas signatory operators' employees who are not UMW members have received Fund benefits (1076-77a).

Phillips' reference (P. 34) to a statement by Trustees' counsel Mitch in a court proceeding, taken

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[9] A summation of eligibility requirements (1074-76a) discloses they contain no demand that an applicant be a UMW member. Similarly, the 1954 Annual Report stated: "Trust Fund regulations governing authorization of pensions are the same as outlined in last year's Annual Report. These regulations require an applicant to be sixty years of age or over at time of application for pension, to have completed twenty years of service in a classified job in the coal industry within the thirty years immediately preceding the filing of an application, to have been regularly employed in a classified job in the coal industry immediately prior to May 28, 1946, and to have retired from a classified job in the coal industry after that date." (1028a).

out of context, was made in a case in which the issue was whether a man, *not an employee of a signatory operator,* could receive benefits under Taft-Hartley's Section 186(c). Mitch made plain the statement "means only members of 'UMW' who happen to be employees of operators signatory of the contract can qualify" (1085a). The statement, Mitch declared, "didn't go further, because they didn't ask me there" and continuing he declared, "If they are 'UMW members' and work in non-union mines they cannot qualify" (1085a).

Phillips persists (P. 39-43) in ignoring and distorting undisputed documentary evidence showing union membership is not a condition precedent to an award of benefits. Pension files show pensions were awarded applicants who had been but were not UMW members when applications were filed and pensions granted (Ex. 138-143; 1669-1712a).

Phillips' statement (P. 42) that Trustees ignored an application until the applicant hired a lawyer has no factual record predicate (see 1515-16a). Similarly, its statement (P. 40) a letter from a Congresswoman was required to obtain an applicant's pension is inaccurate: undisputed proof shows the applicant was twice told it was essential to furnish proof of his age (Ex. 142; 1702a, 1706a); it was supplied only in the Congresswoman's letter; and two days after receipt of necessary proof, the pension was awarded (1707a).

Phillips correctly asserts (P. 41) it sought in interrogatories information as to non-union employees receiving benefits and Trustees objected. Phillips *failed to disclose* that the Fund's reason was *"The Fund does not keep records of union membership of each bene-*

ficiary" (369a). It omitted too that Phillips made no effort before the trial court to achieve answers to its interrogatories.

Phillips' complaint (P. 37) that Trustees maintain their Resolutions in secrecy is opposed by Mitch's undisputed statement, "We tell any applicant that writes into the trust fund . . . what he must meet by way of eligibility" (1086a), which is corroborated by record documents (1684a, 1685a, 1694a, 1678a) and the fact that Fund Annual Reports disclose the eligibility requirements (1026-31a).

Phillips' contention (P. 35) that pensioners were required to retain UMW membership and pay dues after 1950 is countered by positive evidence that "it is definite that a pensioner does not need necessarily, to take his pension, to obtain membership in" UMW and "it is not true that only members of 'UMW' are eligible for awards" (379a).

Though, as Phillips asserts (P. 34), local and district officers processed welfare fund applications, and forms have space for certification of UMW membership (P. 37), this practice was unrelated to any alleged UMW plan to control the Fund. The service was voluntary (287a); 80 per cent of bituminous coal is produced by signatory operators (1162a); 99 per cent or more of applicants were UMW members (364a); thousands of applications have listed fraudulent averments by both individuals and coal companies attempting to "assist" unqualified individuals to obtain benefits; services rendered by local and district officers was "the only source that the information could be gotten respecting (UMW) members and was a "procedural technique designed to protect" the basic integrity of the Fund (361a). Abundant proof establishes it is

unnecessary that application forms be processed by union officials. Applicants have been advised that if they are not UMW members, inquiries should be directed to the Fund (1685a, 1694-95a, 1700a, 1708-09a, 1086a). Pertinently, when an applicant writes directly to the Fund, the portion of the application form requiring union certification is torn off (1087a)—a fact Phillips ignores in discussing the forms (P. 37).

3. The Sixth Circuit Appropriately Concurred in the District Court's Holding That the Evidence Was Insufficient to Show Trustees Held Out to Industry's Employees the Fund Was Under UMW Control

Like the district court, the Sixth Circuit rejected Phillips' contention that Trustees held out to industry employees the Fund was under UMW control.

As already shown (ante, p. 19), Trustees informed the industry's employees of their rights to Fund benefits in Annual Reports which were widely distributed to numerous individuals, including signatory operators, as well as all others requesting copies (1029-31a), and published in their entirety in the UMW Journal (1092a), and which detailed the Fund's activities, showing UMW membership is not the essential element for procuring Fund benefits.

Phillips' contrary assertions are not harmonious with its failure to object to the trial court's characterization of the trust instrument herein as being accordant with Taft-Hartley's requirements and particularly to that portion of the charge reading, "*The trust agreement provides* for the payment of *benefits to employees of signatory operators,* of which Phillips Brothers was one" (1572a). Phillips' contentions are discordant also with its agreement to the trial court's charge that Phillips "knew . . . *employees* were en-

titled" to Fund benefits and was under obligation so to inform them (1553a). Phillips conveniently overlooks this obligation when it complains (P. 39) its employees did not receive Fund benefit cards until they joined UMW.

The trial court's charge is significant too because Phillips points (P. 39) to testimony of an employee who vowed his "understanding" (979a) was that union membership was essential, although Phillips failed to disclose the witness' admission that while he was a UMW member, *benefits were withdrawn when he became employed by a non-signatory employer* (976a). Similarly, another employee "thought if I joined I would have my hospitalization . . ." (969a).

Since the 1950 Agreement (1115a) and Trustee resolutions (Ex. 144; 1074-76a) make *employment by a signatory operator*—not union membership—*the basic eligibility requirement,* it is legally irrelevant what Phillips' two employees understood or thought, for "An erroneous impression of plain terms does not change the meaning of the plain terms" and a contract's terms are not to be judged by "speculative, uninformed impressions of those terms." *Honolulu Star Bulletin, Ltd.* v. *NLRB,* D.C. Cir., 274 F. 2d 567, 570.

Phillips presented no evidence that Trustees held out to industry employees the Fund was under UMW control. Contrariwise, the proof sustains the conclusion that Trustees exercised every reasonable means to inform coal miners of their rights in the Fund.

The Sixth Circuit appropriately rejected, as the district court did, Phillips' contention.

4. The Sixth Circuit Correctly Approved the District Court's Conclusion That the Evidence Did Not Suffice to Show Trustees Required Pensioners to Picket for UMW to Obtain or Retain Fund Benefits

No person was required to picket for UMW to obtain or retain Fund benefits (1025a, 1059a, 1119a). Approval given by the Sixth Circuit to the district court's rejection of this element as proof of the alleged conspiracy, which Phillips again presses (P. 35, 43-47), is totally warranted.

Phillips notes (P. 44) each pension award carries a printed provision subjecting it to termination by Trustees at any time "for any matter, cause or thing" (1520a). Its argument (P. 44) the jury was entitled to conclude that such provision was calculated to, and did in fact, have a strong effect upon pensioners with respect to their obligation to UMW is answered by *Van Horn* v. *Lewis* (79 F. Supp. 544) which holds eligibility rules "can be changed from time to time as matters work out, and as the proper administration of the fund is ascertained".

Phillips points also to pensioners' activities in organizing drives "under the guidance of" UMW district presidents (P. 44); but nothing connects Trustees with such activities. Phillips concedes (P. 45) testimony establishing that pensioners activities were not discussed by Trustees (426a, 1059a, 1078a). In criticizing Trustees for failure to take some action with reference to pensioners, Phillips omits telling this Court that the trial court charged the jury that "Trustees . . . in their official capacity, had no legal right to require or not to require the beneficiaries . . . to picket on behalf of UMW in labor matters" (1572-73a), and Phillips made no objection.

Phillips' concern (P. 44-47) for pensioners obviously was not shared by pensioners themselves, since

no pensioner supports either Phillips' concern or avows the compulsion Phillips asserts. No testimony challenges Trustee Roche's statement she never had complaint from any pensioner who claimed his pension would be dropped if he refused to go on a picket line (1025a).

5. The Sixth Circuit Correctly Approved the District Court's Conclusion the Evidence Did Not Show Trustees Instituted Suits to Eliminate Small Operators

The sole proof offered by Phillips in support of its contention that Trustees used lawsuits to collect delinquent royalties to drive small operators out of business (P. 47) is the list of cases Trustees filed over an extended period of time (Ex. 39, 1607-18a; 428-30a). As the list shows, these suits were brought not only in Tennessee, but throughout the entire bituminous coal producing areas. The trial court observed the list, standing alone, could not be construed as a participating in a conspiracy by Trustees; Phillips agreed (430a).

Uncontradicted evidence shows Trustees placed upon their counsel Mitch sole responsibility of instituting suits to recover delinquent royalties (1019-21a, 1056-57a, 1071a); suits are instituted when recovery by other means fail (1071a); Trustees have never singled out small companies for litigation (1020a, 1057a) nor instructed Mitch to sue to put any operator out of business (1057-58a). Trustee appraisal that Mitch's recommendations of suits are "on the basis of complete impartiality" (1058a) stands unchallenged, as is Mitch's avowal in instituting suits no distinction is made between "large or small operators" or as to areas in which litigation is filed (1072a). No proof offered by Phillips disputes the foregoing evidence.

Every matter posed by Phillips (P. 47-48) reflects lawful conduct: Phillips' complaint of Trustees' insistence of collecting what Phillips terms "the last cent" and the policy of "no settlements" accord with the district court's jury instructions that "Trustees were legally obligated to collect all moneys due the Fund, and to use all reasonable means to make such collection, including . . . lawsuits" (1573a). What possible pertinency to the conspiracy issue is there of the number of Trustees' meetings per year and time spent discussing royalty litigation? And, regretful as it may be that employees may be affected as a result of litigation, the significant factor is that such a fact—if indeed it is one—is not proof of conspiratorial effort against small operators.

Jury justification for a conclusion Trustees enforcing royalty provisions were cooperating with UMW to drive small operators out of business is totally fanciful. "An unlawful purpose is not to be lightly inferred." *NLRB* v. *McGahey*, 5 Cir., 233 F. 2d 406, 413.

Phillips' derisive assertion (P. 31-2) that the operators' trustee position is insignificant is challenged by the undisputed evidence that there was "great difficulty finding anyone . . . satisfactory to the industry" in filling the vacancy created by Owen's death (1054a).

While Phillips continually assured the trial court the various overt acts alleged against Trustees would be "tied up" to the conspiracy, no such evidence was presented. The jury verdict was therefore contrary to the court's instructions that the acts charged against Trustees "standing alone, would not show the Trustees were co-conspirators" (1573a). The Sixth Circuit appropriately rejected the contention of Trustee participa-

tion in the alleged conspiracy in light of Trustees' strong and uncontradicted testimony (325 F. 818).

E. FACTS AND THE SIXTH CIRCUIT'S CONCLUSIONS PERTAINING TO ISSUES OF TRUSTEES' RIGHT TO HAVE THE TRUST PROVISIONS ENFORCED.

1. The Defense of Conspiracy

Phillips' assertion in Argument II (P. 49) that "There was proof to support every phase" of Phillips' conspiracy theories, *without detailing proof thereof,* is merely Phillips' technique of attempting to prove the "claimed existence" of the alleged conspiracy by "constant assertion" thereof "rather than in the proof." *G. & P. Amusement Co.* v. *Regent Theater Co.,* DC, N.D. Ohio, 1952, 107 F. Supp. 453, 461.

Phillips sets forth no facts but asserts both lower courts sustained the jury finding (P. 49), obviously referring to UMW since such statement is inaccurate as to Trustees. However, as demonstrated later herein (*post,* p. 32), the Sixth Circuit held the jury verdict "was not a bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined" (325 F. 2d 818).

2. The Defense of UMW Coercion

Phillips' petition (pp. 50-53) sets forth its statement in support of its contention that the bargaining contract was forced upon Phillips and its employees. Without pointing out the inaccuracies therein, it is noteworthy that *nothing connects Trustees with the alleged events.*

The Sixth Circuit (325 F. 2d 819) approved the district court's award of royalty payments pursuant to the trust provisions from the time Phillips' employees joined UMW.

3. The Defense That the Agreements' Union Security Clause Rendered Them Illegal and Unenforceable and the Sixth Circuit's Rejection Thereof

Collective bargaining agreements in the bituminous coal industry antedating 1947 provided employees of signatory operators shall be or become UMW members. Taft-Hartley's enactment caused operators, in negotiations preceding the 1950 Agreement's execution, to insist the new contract provide for a union shop "to become effective when and to the extent permitted by law." Operators obtained (1476a) a federal court injunction prohibiting UMW from insisting that a successor agreement require UMW membership of employees "without compliance with Taft-Hartley's requirements". Operators and UMW, mandated to bargaining in good faith (1476-78a), agreed upon a union-security clause to comply with Taft-Hartley. Prior to the instant trial, the 1950 Agreement's union security clause had judicial approval of two federal Courts of Appeals (see, *post*, pp. 38-40).

The Sixth Circuit rejected Phillips' position (325 F. 2d 819).

SUMMARY OF ARGUMENT

I. The certiorari petition asserts no reason within this Court's Rule 19 for granting the writ.

II. The petition's Question (1) seeks review of the evidence and discussion of specific facts.

III. The Sixth Circuit correctly sustained the district court's rejection of the jury verdict that Trustees engaged in a *Sherman Act* conspiracy. Both lower courts correctly concluded there was no substantial evidence to sustain the alleged overt acts Phillips contended proved the conspiracy. Both correctly rejected

a verdict based on suspicion alone. The Sixth Circuit properly accepted the district court's setting the jury verdict aside "in the light of the strong and uncontradicted testimony of the Trustees themselves."

Phillips did not challenge the courts' conclusion that "Action of a majority of the Trustees is required to bind the Fund", and it concedes that *two of the three* Fund Trustees did not deal with coal operators conspiratorially.

To overcome the lack of supportive evidence, Phillips charges the district court *misconstrued* its theories; but Phillips agreed to the trial court's jury charges and expressly stated it had no additional ones to offer. It seeks to reinstate a jury verdict whose integrity and validity it itself challenges was based on a misconstruction.

IV. The Sixth Circuit correctly rejected Phillips' contention that the jury's finding of conspiracy rendered unenforceable Phillips' obligation to pay the royalties under the bargaining contract's trust provisions.

Royalties encompassed in the judgment against Phillips are payable to respondents as Trustees of the Fund, which cannot be subjected to legal liability for Trustees' alleged torts.

This Court's *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, 466 (1960) teaches that Phillips' obligation arose "independent of the union's performance" and "upon the production of coal". Phillips' obligation to pay royalties was a condition of employment of employees and "another form of compensation" to them. Phillips should not be permitted to escape its obligation and thus enrich itself after employees have produced its coal. Phillips' illegality contention is challenged by *Kelly* v. *Kosuga*, 358 U.S. 516, 518, holding that "the plea of illegality based on a violation of Sher-

man Act has not met with much favor in this Court." This has particular application where, as here, employees produced the coal in exchange for wages, including the royalties, and Trustees are held not to have engaged in the alleged conspiracy. The relevancy of the Sixth Circuit's citations is not challenged.

V. The Sixth Circuit correctly rejected Phillips' contention that the alleged coercion exerted by UMW in Phillips' execution of the labor agreements and its employees' joining UMW rendered unenforceable Phillips' contractual obligation to pay royalties. It properly swept aside Phillips' argument (P. 63-68) *International Ladies Garment Workers' Union, AFL-CIO* v. *NLRB*, 366 U.S. 731, sustained its position. Whereas Phillips seeks, by evading payment of royalties, to impose a penalty upon Fund *beneficiaries who produced its coal, Garment Workers* made clear "no penalty is attached to the violation" (366 U.S. 740). Phillips would expand *Garment Workers:* instead of limiting its mandate to suspend future consequences of a labor agreement, Phillips would apply it so as totally to destroy rights accrued under the contract prior to any declaration of its status. The Sixth Circuit appropriately rejected Phillips' position, holding that "with respect to the coal already mined and the rights accrued thereby, Trustees' right to recover is not barred", citing *Benedict* (361 U.S. 459) and *Kelly* v. *Kosuga* (358 U.S. 516).

VI. The Sixth Circuit correctly rejected Phillips' contention that the Agreements' union security clause precluded Trustees' recovery of royalties on authority of *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 and *Benedict* (361 U.S. 459, 468-70). Phillips' argument that the bargaining agreements were illegal because UMW did not comply with Taft-Hartley's non-communist affidavit provisions of Section 9(f), (g) and (h) is opposed by *UMWA* v. *Arkansas Oak*

Flooring Co., 351 U.S. 62, 73; *NLRB v. District 50, UMWA*, 355 U.S. 453, 462.

Phillips' contention that the union security clause renders the labor agreements illegal is challenged by decisions of the Sixth and Seventh Circuits, holding the precise clause to be legal. These decisions accord with holdings of this Court and the District of Columbia Circuit. Phillips distorts the meaning of district court cases cited by it.

Moreover, Trustees question Phillips' right to raise the issue presented in its Question (4) [P. 2] involving the union security clause, since Phillips claimed the "*conspiracy*" issue was the sole defense to Trustees' claim (35a, 45a).

ARGUMENT

I. PHILLIPS DOES NOT ASSERT ANY REASON STATED IN THIS COURT'S RULE 19 FOR GRANTING CERTIORARI.

At no place in Phillips' certiorari petition does it assert, as a reason for granting the writ herein, that the Sixth Circuit's decision as to Trustees conflicts with any decision either of this Court or any federal court of appeals, or that it presents an important question of federal law which this Court should settle, or any other reason delineated in the Court's Rule 19-1(b). Indeed, it does not even suggest, as the Rule requires, any "special and important reasons" for the writ's issuance.

II. PHILLIPS SEEKS THIS COURT'S REVIEW OF EVIDENCE WHICH TWO FEDERAL COURTS HAVE HELD DID NOT SUPPORT ITS CHARGE OF CONSPIRACY.

Since Phillips' petition poses, as its Question (1) [P. 2], "*Was there substantial evidence to support the jury verdict that the trustees participated in the con-*

spiracy alleged by Phillips", it invites implementation of the rule that the Court does not "grant a certiorari to review evidence and discuss specific facts". *U.S.* v. *Johnson*, 268 U.S. 220, 227.

III. THE SIXTH CIRCUIT WAS CLEARLY CORRECT IN SUSTAINING THE DISTRICT COURT ON THE CONSPIRACY ISSUE.

Under the factual recitals relating to the *overt acts* which Phillips contended proved Trustees' participation in the alleged conspiracy, Trustees have shown (*ante*, pp. 8-24) the two lower courts correctly appraised the evidence as lacking in support of the conspiracy charges. Phillips does not challenge the Sixth Circuit's finding that there is "no direct evidence" of Trustees' participation (325 F. 2d 818). Pertinently, Phillips *concedes* (P. 22) neither Roche, nor Schmidt nor Owen (while living) dealt with large coal operators conspiratorially. Significantly, it does not attack the lower courts' premise that "Action of a majority of the Trustees is required to bind the Fund" (325 F. 2d 818).

Though Phillips' Question (1) herein poses the inquiry if there was substantial evidence that "Trustees *participated* in the conspiracy" (P. 2), and the jury charge specified the *overt acts* which Phillips claimed constituted Trustees' activities in connection with the alleged conspiracy, Phillips' present quarrel is the trial court misconstrued its theories and that Trustee participation consisted of a majority of Trustees taking a do-nothing attitude with reference to those overt acts (discussed *ante*, pp. 8-24). Yet, in arguing the thesis of misconstruction (P. 56-58), Phillips does not point to evidence of Trustee participation but to alleged efforts of UMW to control the Fund *prior to 1950*, urging operators turned the control of the Fund over to UMW.

When it is considered that Phillips announced to the trial court it had *"no exceptions to the charge and no requests for additional charges"* (1585a), its present charge of misconstruction is not only baseless but is necessitated by its inability to specify any evidence showing Trustee participation in the alleged conspiracy.

Phillips' identical charge of misconstruction made in the Sixth Circuit obviously did not impress that court; and properly so, since not only did the charge come too late but, if the trial court misconstrued Phillips' position *it is indeed anomalous that Phillips seeks to have this Court reinstate a jury verdict whose integrity and validity Phillips itself challenges on the ground it was based on a misconstruction.*

Delaware Valley Marine Supply Co. v. *American Tobacco Co.*, 3 Cir., 297 F. 2d 199, 202, emphasized that "conspiracy remains an essential ingredient of a case based on Section 1" of *Sherman*. As in each of the lower courts, Trustees insisted, as they do now, that the record, vast as it is, is completely without evidentiary predicate for any finding of conspiracy against Trustees. The district court refused to sustain a verdict based upon suspicion (A. 5a), which accords with the holding in *Moore* v. *C & O Ry. Co.*, 340 U.S. 573, 578, that *"Speculation cannot supply the place of proof."* The Sixth Circuit correctly declared there was *no direct evidence* Trustees participated in the alleged conspiracy and appropriately rejected "inferences which Phillips would have us draw" because "not justifiable or reasonable *in the light of the strong and uncontradicted testimony of the Trustees themselves"* (325 F. 2d 818).

IV. PHILLIPS' CONTENTION THAT TRUSTEES MAY NOT RECOVER THE DELINQUENT ROYALTIES BECAUSE OF THE JURY'S FINDING CONCERNING THE ALLEGED CONSPIRACY HAS NO MERIT.

Phillips' argument (P. 59-60) that because the jury found UMW engaged in a conspiracy with major coal companies, the lower courts should not have enforced the trust provisions of the collective bargaining agreement which entitle Trustees to recover delinquent royalties. *One basic factor ignored by Phillips is that Trustees did not participate therein.* While Phillips presented the same argument in the Sixth Circuit, its opinion does not deal with the impact of UMW's participation. However, because the district court held the evidence insufficient to sustain the jury verdict as to Trustees, it held it unnecessary to determine the issue of whether Trustees would be deprived of recovery had there been supporting evidence that Trustees conspired as charged (A. 5a). The Sixth Circuit held (325 F. 2d 818) that, should the district court's ruling and its concurrence therein be incorrect, the jury verdict was not a bar to Trustees' right of recovery of royalty payment "which had accrued under the contract on coal already mined", citing *Kelly* v. *Kosuga*, 358 U.S. 516; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 549; and *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165. Pertinently, Phillips does not challenge the relevancy of the cited cases. Trustees submit the Sixth Circuit's conclusion is a correct one and the same result obtains even upon the assumption of this Court's agreement with the Sixth Circuit's ruling as to UMW on the conspiracy issue.

First, royalties which the judgment encompasses are payable to respondents as Trustees and not to them as individuals. This is a crucial recognition. *Yonce* v.

Miners Memorial Hospital Assn., DC, W.D. Va., 1958, 161 F. Supp. 178, 188, which involved an alleged violation of the Antitrust Act, held "trustees hold legal title to property for the benefit of others" and "a trust fund cannot be subjected to legal liability for the torts of the trustee". Pertinently, *Yonce* held the Trust Fund involved in this instant action "would not be liable for the tortious acts of the trustees in this case, wherein it is alleged they wilfully and purposely violated Secs. 1 and 2 of the Sherman Antitrust Act."

Lewis v. *Benedict Coal Corporation*, 361 U.S. 459, 466, professed that "royalty payments are really another form of compensation to the employees". Thus to permit Phillips herein to prevail in its contention that the alleged conspiracy defeats Trustees' right to recover Fund royalties would deprive employee beneficiaries of the right to compensation for labor admittedly performed and would do violence to lawful rights of innocent employes and, at the same time permit Phillips to escape its legal duty to pay the royalties which *Benedict* declared arose "upon the production of coal" (361 U.S. 466). Phillips would thereby become enriched at the expense of the Fund beneficiaries who have produced the coal when Benedict's teaching is that Phillips' obligation arose *"independent of the union's performance"* (361 U.S. 466).

NLRB v. *Rockaway News Supply Co.*, 345 U.S. 71, 77, rejects Phillips' contention in its statement:

> *"It is one thing for the Board to say that the parties should not go on under such a contract; it is another to say that no effect whatever may be given to a contract. . . ."*

The instant royalty claims became a condition of employment as to Phillips' employees in their individual employment contracts (*J. I. Case Co.* v. *NLRB*, 321 U.S. 332; *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 469), and were entered into by the employees with Phillips *in good faith*. To permit Phillips now to escape the payment of the royalties which flow to the employee-beneficiaries of the Fund (*Benedict*, 361 U.S. 468-9)[10] would permit Phillips to escape the obligation which he contracted, not alone with UMW, but with his employees who are guiltless of any wrong. These evident results from sustaining Phillips' argument stresses the pertinency of the quoted language from *Rockaway*.

Phillips concedes (P. 59) that not every contract made to carry out a conspiracy in restraint of trade is invalid; but Phillips argues that where the invalidity is inherent in the contract and the court would be enforcing the precise conduct made unlawful by such law, the anti-trust laws deny enforcement of the contract (P. 59).

Trustees submit that nothing contained in the trust instrument inherently tainted the contract; the trial court so told the jury (1572a) and *Phillips acquiesced* (1585a). Further, *the jury charge, with which Phillips was in whole agreement*, indicated no provision which rendered the collective agreement invalid. Thus, there is again presented in Phillips' arguments a position which does not coincide with the views of the Court's

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[10] In *Benedict*, the Supreme Court noted that "the obligation to pay royalty might be thought to be incorporated into the individual employment contracts" and that the similarities of royalty to wages "militates against the inference" that the trustees' claim be subject to offset (p. 469).

charge. Phillips' petition offers no case citation to support its position.

On the other hand, even if the Agreement were tainted, either by its language or by any conspiracy, *Kelly* v. *Kosuga*, 358 U.S. 516, rejects Phillips' contention. This Court (p. 519), assuming but not deciding "the petitioner's allegations duly charged a violation of" *Sherman*, declined to disregard claims brought under the terms of a contract though violative of *Sherman*. "*As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court*", stated the Court (358 U.S. 518), and, continuing, "*This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of the goods sold*" (p. 518). Concluding, the Court announced that "where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself", it is not "inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question" (p. 521). *Kelly*, significantly, was a case wherein the parties litigant were parties to the contract asserted to violate *Sherman*. Certainly, in the instant situation where Trustees are not involved in the making of the contract or in the conspiracy, Phillips' illegality plea is less appealing than that in *Kelly*.

Benedict's holdings that "royalty payments are really another form of compensation to the employees, and as such the obligation to pay royalty might be thought . . . incorporated into the individual contracts" and employees (as said in *Kelly*) have given a "fair consideration" in services in exchange for the royalty

payments, plus the holdings of *Rockaway* and *Case*, show the propriety of the Sixth Circuit's approval of the judgment in Trustees' favor against Phillips.

V. THE SIXTH CIRCUIT CORRECTLY REJECTED PHILLIPS' CONTENTION THAT THE MANNER IN WHICH PHILLIPS EXECUTED THE AGREEMENTS AND ITS EMPLOYEES BECAME UNION MEMBERS RENDERED THE AGREEMENTS INVALID.

The district court held Trustees were entitled to recover unpaid royalties when Phillips was signatory to the National Agreement and during which UMW represented a majority of Phillips' employees, namely, from April 25, 1955 to December 31, 1958 (A. 5a).

As in the Sixth Circuit, Phillips asserts (P. 60-68) UMW never represented an uncoerced majority of its empolyees and *Garment Workers*, under such circumstances, precludes enforcement of the bargaining agreement to any extent. In disagreement, the Sixth Circuit opined *Garment Workers* to be inapplicable (325 F. 2d 819) and that "In any event, *with respect to the coal already mined and the rights accrued thereby*, . . . the Trustees' right to recover is not barred", citing *Benedict* (361 U.S. 459) and *Kelly* v. *Kosuga* (358 U.S. 516).

Garment Workers, the Sixth Circuit pointed out (325 F. 2d 819), charged an employer with an unfair labor practice, condemned a labor contract because the union did not represent a majority of the employees, and ordered the employer not to give effect thereto, at the same time directing a representation election.

Notably, the Board Order enforced in *Garment Workers* (366 U.S. 731) did not void the collective agreement; instead, it assiduously recited that *nothing* therein should "*prejudice the assertion by employees*

of any rights they may have" under the condemned contract. *Bernhard-Altmann Texas Corp. et al and Int. Ladies' Garment Workers' Union,* AFL-CIO, 122 NLRB 1289, 1295. The Board Order was positive that wages and working conditions under the condemned contract were to continue, and *Garment Workers* (366 U.S. 739) noted the Order "merely requires that recognition be withheld until the Board-conducted election results in majority selection of a representative." It made clear *"no penalty is attached to the violation"* (366 U.S. 740). Yet, the result Phillips seeks herein would not only penalize by denying Trustees the right of recovery but its ultimate effect would be imposed upon employees whose rights *Garment Workers* carefully enunciated were not to be prejudiced.

This significant factor Phillips overlooks in pressing upon this Court that if a "contract is invalid and not to be enforced in a Board case" for lack of majority representation "or because of coerced representative status" as in *Garment Workers,* the same result obtains herein (P. 68).

But, Phillips' argument expands *Garment Workers'* mandate and instead of limiting it to suspend or abate future consequences of a labor agreement, as *Garment Workers* does, Phillips seeks to apply it so as totally to destroy rights which accrued under the contract prior to any declaration of its status.

Phillips' contentions are challenged by *NLRB* v. *Rockaway News Supply Co.,* 345 U.S. 71, 77, where, in considering the enforceability of a labor agreement's union shop clause claimed inconsistent with Taft-Hartley's requirements, this Court observed:

> ". . . even if inclusion of a forbidden provision is enough to justify the Board in setting [the

> collective bargaining agreement] aside *as to the future, it does not follow that it can be wholly ignored in judging events that occurred before it was set aside.*"

Moreover, *Garment Workers'* recognition that employers' rights are not to be prejudiced has special applicability herein where Trustees seek recovery of unpaid royalties *on coal already mined. Benedict's* holding that a signatory's "duty to pay royalty" arose "on the production of coal" is consonant with the Sixth Circuit's requirement that Phillips pay on coal already mined by his employees. Further, a ready answer to Phillips' argument that UMW's majority resulted from union activity coercing employees in selecting UMW, is found in *Benedict's* enunciation that the duty to pay Trustees the royalty is "independent of the union's performance" (361 U.S. 466). Phillips overlooks that, just as the Agreement it signed vested Trustees with the right to have the stipulated royalty, the same Agreement burdened Trustees with an obligation to provide Phillips' employees with Fund benefits—an obligation characterized *as a valuable right accorded those employees. Lewis* v. *Mearns*, DC, N.D. W. Va., 1958, 168 F. Supp. 134, 138, aff'd. 4 Cir., 268 F. 2d 427.

Notably, Phillips does not challenge the Sixth Circuit's reliance upon *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), discussed *ante*, p. 35. The Sixth Circuit was clearly correct in rejecting Phillips' position,

VI. THE SIXTH CIRCUIT CORRECTLY REJECTED PHILLIPS' CONTENTION THE UNION SECURITY CLAUSE IN THE AGREEMENT PRECLUDED TRUSTEES' RECOVERY OF DELINQUENT ROYALTIES.

Phillips' urges (P. 68-72), as in the Sixth Circuit, that Trustees are precluded from recovering unpaid royalties because UMW had not complied with the

non-communist affidavit provisions of Taft Hartley's Section 9(f), (g) and (h) [29 USCA 159(f), (g) and (h)], thus rendering the contract and its union security clause illegal. The Sixth Circuit (325 F. 2d 819) rejected Phillips' position on authority of *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, which avows (p. 77),

> "It is one thing . . . to say that the parties should not go on under such a contract; it is another to say that no effect whatever may be given to a contract . . ."

and *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, 468-470, where this Court, after noting that Phillips' *legal duty to pay royalties arose "upon the production of coal . . . independent of the union's performance"* (p. 466) held *inter alia* (p. 469) "royalty payments are really another form of compensation to the employees."

Phillips wittingly persists in misconceiving the legal import of Taft-Hartley's non-communist affidavit requirements. In seeking to have the bargaining contract rendered illegal because, as Phillips argues, "UMW was disdainful" of such statutory provisions, it ignores this Court's holding that the statute "merely describes advantages that may be gained by compliance with their conditions." *UMWA* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 73; *NLRB* v. *District 50, UMWA*, 355 U.S. 453, 462.

The charge of illegality which Phillips would impress upon the bargaining contract herein because of its union security clause is fully dissipated by *Lewis* v. *Fentress Coal and Coke Co., Inc.*, DC, M.D. Tenn., 1958, 160 F. Supp. 221, aff'd. 6 Cir., 264 F. 2d 134; *Lewis* v. *Quality Coal Corp.*, 7 Cir., 270 F. 2d 140 (1959), cert. den. 361 U.S. 929, and *UMWA* v. *NLRB*,

7 Cir., 284 F. 2d 910 (1961), in which the clause challenged by Phillips was declared lawful. These cases, refuting Phillips' position, accord with *NLRB* v. *News Syndicate Co.*, 365 U.S. 695 (1961); *Int. Typo. Union, AFL-CIO*, 365 U.S. 705 (1961), and *Honolulu Star-Bulletin, Ltd.* v. *NLRB*, D.C. Cir., 274 F. 2d 567 (1959).

Phillips distorts the meaning of the district court's *Lewis* v. *Fentress* (160 F. Supp. 221), *Lewis* v. *Hixon*, DC, W. D. Ark., 1959, 174 F. Supp. 241, and *Lewis* v. *Kerns*, DC, S. D. Ind., 1959, 175 F. Supp. 115. Contrary to Phillips, they do not stand for the proposition that "this Union Security Clause was in effect and was intended to be enforced except in 'right to work' states'" (P. 71). Though stating the clause was not intended to be in effect in right-to-work states, which was the issue in both *Hixon* and *Kerns*, nothing in either case indicates, as Phillips interprets them, the clause was intended to be effective elsewhere. Both *Fentress* (160 F. Supp. 221) and the Seventh Circuit's *Quality* and *UMWA* v. *NLRB* cases are to the contrary.

In any event, Trustees question Phillips' right to raise Question IV since Phillips, in a successful pretrial motion to consolidate for trial Trustees' claim with Phillips' claim against UMW, to which both Trustees and UMW objected, Phillips declared the conspiracy was *"the only defense to"* Trustees' claim (45a). Further, Phillips agreed to the dismissal of its claim against UMW based upon 29 USCA, Section 158(b), the district court noting Phillips "concedes" the ground "well-taken" (35a).

CONCLUSION

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 24, 1964

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIVIL ACTION No. 3431

JOHN L. LEWIS and JOSEPHINE ROCHE, as TRUSTEES of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND.

HENRY G. SCHMIDT, Trustee (amended 8-11-58), *Plaintiffs*,

v.

JAMES M. PENNINGTON, RALPH E. PHILLIPS and *BRUCE PHILLIPS, Individually and trading as PHILLIPS BROTHERS COAL COMPANY, A Partnership,

*LILLIAN GOAD PHILLIPS, Admrx, as defendant and cross plaintiff in the place and stead of Bruce Phillips (substituted 9-30-60), *Defendants*,

v.

UNITED MINE WORKERS OF AMERICA, *Cross Defendant*.

* * * * * * * * * * *

Filed July 31, 1961

Opinion Rendered From the Bench

This case was tried to a jury and the Court and consumed approximately five weeks of trial time. The jury returned a verdict on May 19, 1961 in response to two verdict forms, the pertinent parts of which read as follows:

* * * * * * * * * * *

The other verdict form is as follows:

"1. Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize

commerce among the several states, as alleged by the original defendant, Phillips Brothers Coal Company?"

The jury answered "yes".

For convenience the International Union will be referred to as U.M.W.; James M. Pennington, et al, as Phillips Brothers; and Messrs. John L. Lewis, Henry G. Schmidt and Miss Josephine Roche as Trustees.

* * * * * * * * * * *

This brings us to the Trustees' motion to set aside the verdict of the jury and to enter judgment in their favor for $55,982.62 with interest. The motion is based upon the proposition that the evidence is insufficient in law to sustain the verdict of the jury that the Trustees engaged in the conspiracy charged in the counterclaim.

The overt acts charged against the Trustees are:

(a) The Trustees paid benefits only to members of U.M.W.

(b) The Trustees required the beneficiaries of the trust to picket or perform other acts for the U.M.W. in order to obtain or retain pension benefits, or acquiesced in the doing of these things by the beneficiaries.

(c) The Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced.

(d) The Trustees held out to the men in the industry that the Fund was under Union control.

(e) The Fund, in fact, was under the domination and control of the U.M.W.

The Court charged the jury that these acts standing alone were not sufficient to establish that the Trustees were co-conspirators.

The Court further charged the jury that the acts of individuals, unless the Trustees actually authorized the unlawful acts, if any, or ratified such acts, if any, after actual knowledge thereof, would not bind the Trustees so as to make them parties to the alleged conspiracy.

The Court further charged that the Trustees, in their official capacity, had no legal right to require or not to require the beneficiaries of the Fund to picket on behalf of U.M.W. in labor matters; that the Trustees were legally obligated to collect all monies due the Fund and to use reasonable means to make such collection, including the bringing of suits; that the Fund "was created by a trust instrument contained in the National Bituminous Coal Wage Agreement of 1950 pursuant to Section 302 of the Taft-Hartley Act, and the wording of the trust agreement was in accordance with the requirements of the Taft-Hartley Act. The trust instrument provides for payment of benefits to employees of signatory operators. . ."

Action of a majority of the Trustees is required to bind the Fund. See *Van Horn* v. *Lewis*, 79 F. Supp. 541.

In the opinion of the Court there is no substantial evidence to support the verdict of the jury that a majority of the Trustees participated in the alleged conspiracy. There is no evidence that either Miss Josephine Roche or Mr. Henry G. Schmidt or Mr. Charles A. Owen, now deceased, (those parties being the only parties, except Mr. John L. Lewis, who served the trust fund after 1950), had any dealings with large coal operators from which it could be inferred that they agreed, combined, or conspired to stabilize coal prices in the bituminous coal industry in interstate commerce.

The actions of Mr. Lewis alone without authorization or consent of a majority of the Trustees would not be sufficient, in the opinion of the Court, to bind the Fund or to show that the Trustees conspired with the large coal operators to drive a small operator out of business. If it had been shown that Mr. Lewis controlled the actions of the other Trustees at the time this alleged conspiracy was formed, this might present a different question.

In the opinion of the Court there is no evidence to support the verdict of the jury that Mr. Lewis, for himself and another of the Trustees, entered into the conspiracy so as

to bind the Trustees either individually or in their capacity as trustees or to bind the Trust Fund.

The charge that the Trustees were conspirators seems to have been directed at Mr. Lewis. This can very well be understood inasmuch as Mr. Lewis served in a dual capacity. He was president of the U.M.W. during the material period and also chairman of the Fund during this period.

Counsel for Phillips Brothers pointed out in their brief that Mr. Lewis made certain statements in his testimony given on discovery to the effect that the U.M.W. and some of the large coal operators decided to stabilize prices, but some of his testimony during the trial was not entirely consistent with that testimony. If there is a sound basis for such contention, we do not believe that this is sufficient to sustain the verdict of the jury that the Trustees participated in the conspiracy.

The evidence is reasonably clear that Union membership was not a prerequisite for obtaining benefits from the Fund after 1950. In that connection, it must be recalled that in 1951 the Trustees published a brochure setting forth in detail the requirements of pension benefits, not one of which was Union membership. Trustees Roche, Schmidt and Lewis each testified that benefits from the Fund have been paid to non-Union members as well as to Union members. Such was also the testimony of counsel Mitch.

The evidence is insufficient to show that the Trustees instituted suits for the purpose of eliminating small operators. Trustees Roche and Schmidt testified that the matter of institution of suits was left in the hands of counsel Mitch for the most part.

The evidence is insufficient to show that the Trustees required pensioners to picket for the U.M.W. in order to obtain or retain benefits of the Fund.

The evidence is insufficient to show that the Trustees held out to industry employees that the Fund was under Union control. The Trustees testified positively that the Union

did not dominate or control the Fund. The evidence is insufficient to show the contrary.

It is true that there are some suspicious circumstances in the record not only as to these matters but also as to other charges against the Trustees. However, a juror's verdict cannot be based upon suspicion alone. *N.L.R.B.* v. *Sun Shipbuilding & Dry D. Co.*, (C.A. 3), 135 F. 2d 15, 31.

Substantial evidence means more than merely the suspicion of the existence of a fact. *Hazel-Atlas Glass Co.* v. *N.L.R.B.*, (C.A. 4), 127 F. 2d 109, 117.

Having found that there is no substantial evidence to support the verdict of the jury that the Trustees engaged in the conspiracy as charged by Phillips Brothers, it follows as a matter of contract that the Trustees are entitled to recover unpaid royalties due them under the contract signed by Phillips Brothers, but the Trustees are not entitled to recover the royalties that accrued before a majority of the employees of Phillips Brothers became members of the Union. At the time Phillips Brothers signed the National Bituminous Coal Wage Agreement of 1950, the U.M.W. did not represent a majority of their employees and therefore was not the bargaining agent for the employees. We think that a fair interpretation of the record shows that a majority of the employees of Phillips Brothers joined the Union on April 25, 1955. The Trustees, therefore, are entitled to recover unpaid royalties that accrued after that date. The Court bases this conclusion on the principles announced in the case of *International Ladies Garment Workers' Union, AFL-CIO* v. *N.L.R.B. and Bernhard-Altmann Texas Corporation*, U. S. Supreme Court, June 5, 1961.

In view of the foregoing conclusions, it is not necessary for the Court to determine the question of whether the Trustees would be deprived of recovery if there had been evidence to support the verdict of the jury that the Trustee joined in the conspiracy, as charged by Phillips Brothers.

* * * * * * * * * *

APPENDIX B

Entered August 2, 1961

Judgment

This case came on to be heard before the Honorable Robert L. Taylor, Judge, upon the verdict of the jury, the motion of the plaintiffs-trustees, John L. Lewis, et al, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial, and also upon the motion of the cross-defendant, United Mine Workers of America, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial, together with the petition and supporting affidavits of cross-plaintiffs for the allowance of attorneys' fees, and upon the entire record in the case and the Court having fully considered thereof together with the briefs and arguments of counsel is of the opinion and doth hold and adjudge for reasons stated in a memo delivered from the Bench that there is no material or substantial evidence in this record to support the finding of the jury that he Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states as alleged by the original defendants, James M. Pennington, Raymond E. Phillips, and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership known as Phillips Brothers Coal Company.

WHEREFORE IT IS ORDERED AND DECREED that the verdict of the jury in so finding be set aside and the Court doth award the plaintiffs-trustees judgment for a portion of the claim asserted herein by them, finding and holding that said Trustees are entitled to have and recover royalty upon the quantity of coal produced for use or sale by the defendants, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership Phillips Brothers Coal Company, only for the period from and after April 25, 1955

to and including December 31, 1958, or a total of 108,560.56 tons, at the rate of Forty Cents ($0.40) per ton, or the sum of Forty-three Thousand, Four Hundred Twenty-four and 22/100 ($43,424.22) Dollars.

. . . . . .